STATE OF MICHIGAN
IN THE SUPREME COURT

GRANT BAUSERMAN, KARL WILLIAMS, And TEDDY BROE, individually and on behalf of a class of similarly-situated persons,

Plaintiffs-Appellees,

v.

STATE OF MICHIGAN UNEMPLOYMENT INSURANCE AGENCY,

Defendant.

_____/

Supreme Court Case No. 156389

Court of Appeals No. 333181

Court of Claims
Case No. 2015-000202-MM
Hon. Cynthia Diane Stephens

REPLY BRIEF IN SUPPORT OF PLAINTIFFS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

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I. PLAINTIFFS' CLASS ACTION SEEKS DAMAGES FOR THE WRONGFUL DEPRIVATION OF THEIR PROPERTY. THAT CLAIM ACCRUED WHEN THE AGENCY ACTUALLY SEIZED PLAINTIFFS' PROPERTY.

Plaintiffs filed this class action because the Michigan Unemployment Insurance Agency intercepted their tax refunds, garnished their wages, and collected repayments based on false charges of unemployment fraud. Ex. 4, ¶164.[1] These false fraud charges happened because the Agency used an automated system called MiDAS to detect and adjudicate suspected fraud cases. Ex. 3; Ex. 4, ¶¶35-55. Approximately 40,000 falsely charged with unemployment fraud. *Id.* Plaintiffs brought a claim under the due process clause of the Michigan Constitution, seeking economic damages equal to the amounts seized. Ex. 4, p. 35, ¶¶ C and D.

The wrongful state action proscribed by the due process clause, and the wrong on which the plaintiffs' claim is based, is the deprivation of a person's property, by the state, without due process. Const. 1963, Art. 1, §17; see *Fuentes v Shevin*, 407 US 67, 81 (1972) (observing that the core prohibition of the due process clause is "the prohibition against the deprivation of property without due process[.]"

The Court of Appeals held that the "wrong" on which plaintiffs' claim was based was the issuance of a fraud redetermination. But a redetermination is merely an event preceding the deprivation of the plaintiffs' property. It does not itself deprive any person of their property. At the time of the redetermination, and any future economic losses stemming from it, are still subject to dispute and appeal through the administrative process. Ex. 5. The Agency's issuance of a redetermination cannot be the "wrong" giving rise to the plaintiffs' claim for damages because it is not final and because it does not deprive the claimant of property.

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[1] With the exception of Ex 1 and 2 to this reply, the *Mays* and *Gulla* opinions cited on p. 4-5, the other cited exhibits are attached to Plaintiff's Application for leave and numbered as they were in the Application.

Defendant cites *Carey v Piphus*, 435 US 247, 266 (1978), but that case is inapplicable to deciding when the plaintiff's claim accrued. In *Carey*, the Supreme Court held "that in the absence of proof of actual injury, [plaintiffs with constitutional torts] are entitled to recover only nominal damages." *Id.* *Carey* says nothing about when a claim for economic damages accrues under the Michigan due process clause. In fact, it holds that a claim for "substantial damages," rather than nominal damages, can only be pursued after an actual injury (and not merely a technical deprivation of process) has occurred. *Carey,* 435 US at 266. Here, the plaintiffs' claim for damages is based on "actual injury" because plaintiffs seek economic damages equal to the amount of the actual losses. *Carey* holds that these are valid damages claims.

The Agency's citation to *Ranch Rheaume, LLC v Dept of Agriculture*, an unpublished decision of the Court of Appeals, is also unpersuasive. Unlike the plaintiffs here, the plaintiff in *Ranch Rheume* made no effort to comply with MCL 600.6431. Moreover, the plaintiff did not allege constitutional torts in his complaint and raised the issue for the first time in his appeal. The Court of Appeals did not analyze when a claim for damages for deprivation of property accrues.

Defendant cites *Butcher v City of Detroit*, 131 Mich App 698, 706 (1984), where the Court of Appeals held there was no violation of the Takings Clause because the city's ordinance, which required a certification and inspection prior to a private sale of property, "neither destroys nor reduces the property's value." *Id* at 707. Similarly, here, the issuance of a redetermination notified plaintiffs that the Agency had detected possible fraud in their unemployment cases. Ex. 5. Like the ordinance in *Butcher*, the redetermination did not impose a final or certain impairment of the plaintiff's property rights. It merely informed them that the state may impose penalties and seize property. Like the ordinance in *Butcher*, the notice of redetermination was an administrative act preceding deprivation. It did not itself constitute a deprivation of property.

Bauserman's case illustrates the redetermination itself did not impose a final deprivation of property. After receiving the redetermination, Bauserman submitted multiple letters to the UIA in a futile effort to explain why he was not guilty of fraud. See Ex. 4, ¶¶86-97. The Agency did not acknowledge his appeals. *Id.* Only after the Agency seized Bauserman's tax refund would he understand he had been deprived of his property without notice of the basis for the charges and an opportunity to challenge them. Only then could he pursue a claim for damages to redress the deprivation of property. This Court should grant leave and hold that Bauserman's claim accrued when the state actually seized his property.

II. THIS COURT SHOULD GRANT LEAVE TO CLARIFY WHEN A CLAIM FOR DAMAGES ACCRUES BECAUSE, IN THE ABSENCE OF CLEAR GUIDANCE FROM THIS COURT, LOWER COURTS WILL CONTINUE TO STRUGGLE TO APPLY MCL 600.6431

In order to settle confusion in the lower courts, this Court should grant leave and hold that a claim for damages based on the wrongful deprivation of property without due process, in violation of Article 1, Section 17 of the Michigan Constitution, accrues when the state actually seizes property.

Defendant argues that the Court of Appeals reached its conclusion simply by applying "the plain language of the Court of Claims Act[.]" Defendant's Brief, p. 1. Contrary to the defendant's assertion, the Court of Appeals' decision, along with other recent cases, demonstrates significant confusion in the lower courts about the proper application of MCL 600.6431 in cases involving constitutional torts.

In this case, the Court of Claims held plaintiffs' claims were timely because they could not fully allege the elements of their claim until the Agency issued the redeterminations on

September 30, 2015 and November 4, 2015, which rendered the previous fraud determinations null and void. Court of Claims Opinion, p. 7.[2]

The Court of Appeals viewed this case differently. It concluded that even though the due process clause proscribes deprivations of property by the state, the "wrong" on which the plaintiffs' constitutional tort claim was based was the underlying lack of process at an earlier stage of the administrative timeline, specifically, when the Agency issued an initial fraud redetermination to the plaintiffs. Court of Appeals Op., p. 9-10.

On October 16, 2016, in *Mays v Snyder*, Court of Claims Case No. 16-000017-MM, the Court of Claims (Boonstra, J.) applied a different analysis of MCL 600.6431 in a constitutional tort claim arising out of the water contamination crisis in Flint. (Ex. 1 to Reply, *Mays* Opinion). The state argued the plaintiffs' claims were untimely because they accrued on either of two earlier dates, when the state first ordered a switch to corrosive Flint River water, or when the users began receiving that water from their taps, and not when the plaintiffs realized they were being harmed by the water. *Id.* at 8-9. The Court of Claims denied the defendant's motion for summary disposition on the notice issue, holding: "[w]ere [it] to accept the defendants' position, it would have to find that plaintiffs' claims are barred because they should have filed suit (or notice) at a time when the state itself was stating that it lacked any reason to know that the water supply was contaminated. The Court is disinclined to so find." *Id.* at 9. The court reasoned that

[2] The absurdity of the defendant's position, and the Court of Appeals' reasoning, is demonstrated by the fact that after plaintiffs filed this class action, the Agency issued new redeterminations as to plaintiffs Bauserman and Broe, which rendered the initial redeterminations null and void. See defendant's brief, p. 6; Ex. 4, ¶104. The Court of Appeals' conclusion is clearly erroneous because it holds the plaintiffs were required to file their claims or notices within six months of these "null and void" redeterminations. In other words, because the redeterminations were a legal nullity, they actually deprived the claimants of neither "process" nor "property." The rule of law advanced by defendant, which would require claimants to sue or file notice of suit upon receipt of a redetermination, which is itself a legal nullity, is absurd on its face.

resolution of the notice issue was premature given the nature of the harm itself and the difficulty in resolving when the use of Flint River water harmed the plaintiffs. *Id.* at 10-11. The *Mays* court further held that application of the notice requirement in the manner proposed by the state defendants would effectively divest the plaintiffs of their constitutional right to access the courts. *Id.* at 9-10. The court noted that in a case involving a course of conduct leading to a constitutional violation, it is difficult to identify the single event giving rise to the constitutional tort. "Unlike a suit, for example, brought to recover for personal injuries sustained in an automobile accident where the event giving rise to the cause of action is the accident…in the present suit the event giving rise to the cause of action was not readily apparent at the time of its happening." *Id.* at 10.

Similarly, here, when UIA claimants received initial fraud redeterminations from the Agency, they had no reason to know that the Agency would ignore their appeals and deny them an opportunity to contest the findings before seizing their property. Indeed, as the state has publicly admitted, many UIA claimants did not receive notice before the Agency took their money. Ex. 3. Like Flint residents who used contaminated tap water for months without knowing when or how the problem started, the plaintiffs here did not know that the Agency had used the MiDAS system, or that the system had determined them guilty without notice or an opportunity to be heard, until actual seizures were imposed.

Most recently, on September 13, 2017, in *Gulla v Snyder*, Court of Claims Case No. 16-000298-MZ, the Court of Claims (Murray, J.), considered the notice provisions of MCL 600.6431 in a separate Flint water case. (Ex. 2 to Reply, *Gulla* Opinion). In *Gulla*, the plaintiffs brought constitutional tort claims under the due process clause for damage caused to their property by the use of corrosive Flint River water in the city's system. *Id.* at 1. The court held the

plaintiffs filed their claims too late and granted the state defendants' motion for summary disposition. The court analyzed the application of MCL 600.6431 much differently from the Court of Appeals in this case., concluding "that plaintiffs' claims in the instant case did not begin to accrue until plaintiffs knew or had reason to know that they had a cause of action or causes of action against the state for the harm allegedly incurred by ingesting contaminated water." *Id.* at p. 3-7. The court concluded that the accrual clock started upon the latest event constituting the violation, not the earliest. *Id.* at 12.[3]

In this case, the reasoning in *Gulla* supports the conclusion that plaintiffs' claims did not accrue until the plaintiffs knew or had reason to know that they had a cause of action under Const. 1963, Art. 1, §17. But without clear direction from this Court, lower courts will continue to struggle to determine when claims for damages accrue for purposes of the Court of Claims Act. To settle the issue and provide guidance to the lower courts, this Court should grant leave and hold that the plaintiff's constitutional tort claim, which arises under the due process clause, accrued when the state actually deprived the plaintiffs of their property.

III. IF THE COURT OF APPEALS' DECISION STANDS, TENS OF THOUSANDS OF MICHIGAN CITIZENS WILL BE DEPRIVED OF ACCESS TO THE COURTS TO REDRESS VIOLATIONS OF FUNDAMENTAL RIGHTS.

The standard created by the Court of Appeals would deprive tens of thousands of access to the courts to redress violations of their due process rights. Defendant argues claimants can comply with the requirements of MCL 600.6431 merely by filing a notice, even if they have not sustained any deprivation of property. But under the statute, claimants are not merely required to file a notice, but rather must file a notice "stating the time when and the place where such claim

[3] In a footnote, the Court of Claims expressly noted that its analysis of MCL 600.6431 differed from the Court of Appeals' decision in this case, but noted that it was not bound by the Court of Appeals opinion because it was unpublished. See Ex. 2, *Gulla* Opinion and Order, p. 5 n. 4.

arose and in detail the nature of the same and of the items of damage alleged or claimed to have been sustained." MCL 600.6431(1). For claimants whose property is taken without due process, it would be physically impossible to satisfy this requirement by filing a claim for damages after the redetermination is issued but before any property has been deprived. *See Schaendorf v Consumers Energy Co*, 275 Mich App 507, 512 (2007) (holding that selection of a premature accrual date, "would permit a cause of action to be barred before any injury resulted…").

IV. IN THE ALTERNATIVE, IF THIS COURT DENIES LEAVE TO APPEAL, THE COURT SHOULD REMAND THE CASE TO THE COURT OF CLAIMS.

If leave is denied because Bauserman's individual claim was not timely, this Court should nonetheless remand the case to determine if a putative class member with a timely claim should be substituted in as a new class representative. Such relief would ensure that class members with timely claims are not deprived of their right to pursue those claims, based on a technical defect applicable to a named plaintiff.[4]

Contrary to defendant's argument, plaintiffs did not waive this issue. In their brief on appeal, plaintiffs argued the filing of the complaint on September 9, 2015 "tolled the statute of limitations" and "the claims of class members are timely if they accrued within three years prior to that filing." Plaintiffs' Brief, p. 14 & n.3. Plaintiffs raised the issue and have the right to litigate the issue of relief and what the consequences of the Court of Appeals' holding should be, if the Court of Appeals' is affirmed or if leave is denied. The rights of class members with timely claims will be irreparably harmed unless they are afforded an opportunity to find a substitute to

[4] It is undisputed MiDAS was active from October 1, 2013 to September 4, 2015. Plaintiffs filed this action on September 9, 2015. If the Court of Appeals' reasoning stands, a claimant who received a notice of redetermination in the six-month period before September 9, 2015 is a member of the plaintiff class and could substitute as class representative. To hold otherwise would be to leave class members "stranded in the present," even though they had every right to rely upon the commencement of this case to preserve their rights.

take the place of the currently named plaintiffs. And because this case raises significant constitutional issues pertaining to the integrity of state governmental operations, this Court should exercise its discretion to review the issues raised.[5]

Furthermore, the "single-filing," or "vicarious exhaustion" rule, allows the filing of notice by one plaintiff to satisfy the notice obligations of other plaintiffs. *Howlett v Holiday Inns*, 49 F3d 189, 194 (6th Cir. 1995). The rule is implicated where, as here, one plaintiff to a class action lawsuit has met the filing requirements, but other plaintiffs have not. *Id.*

A Georgia Supreme Court case, *Barnes v City of Atlanta*, 281 Ga 256 (2006), is of note. The plaintiffs in *Barnes* were a group of attorneys that challenged the constitutionality of the City of Atlanta's occupation tax. *Id.* Georgia had a statutory pre-suit notice requirement in tax refund cases. *Id.* at 257. The Court held the named plaintiff fulfilled the pre-suit condition by giving the city notice of the claim by filing administrative and civil actions. *Id.* at 258. The Court held: "where, as here, 'exhaustion of administrative remedies is a precondition for suit, the satisfaction of this requirement by the class plaintiff normally will avoid the necessity for each class member to satisfy this requirement individually.'" *Id.* The Court ultimately held that even though many of the class members had not met their pre-suit conditions, the named plaintiff satisfied the requirement for the entire class of attorneys by providing notice to the City through its filing of the law suit. *Id.* The Court reasoned that "[l]imiting recovery only to those taxpayers with the foresight to have demanded a refund is 'untenable in a case such as this, where the matter is of constitutional import and where, in practical consequence, the [notice] purpose of the [ordinance] was realized.'" *Id.* at 259 (emphasis added) (citations omitted).

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[5] See, e.g., *Dation v Ford Motor Co*, 314 Mich 152, 161; 22 NW2d 252 (1946); *Perin v Peuler*, 373 Mich 531, 534-535; 130 NW2d 4 (1964); *Felcoskie v Lakey Foundry Corp*, 382 Mich 438, 442; 170 NW2d 129 (1969).

In this case, MCL 600.6431 is analogous to other pre-suit conditions and exhaustion requirements. It serves the same purpose of filing a charge with the EEOC in Title VII cases, going through the prison complaint process under the PLRA, or notifying the government of a tax lawsuit in the State of Georgia.[6] Therefore, the principle of the single-filing rule or vicarious exhaustion exception should apply to MCL 600.6431. The purpose of MCL 600.6431 was satisfied when the named plaintiffs filed the class action complaint on September 9, 2015. Additionally, as in *Barnes*, limiting recovery only to those with the foresight to challenge their expropriation is untenable, especially since there is a matter of constitutional importance and has such practical consequences to people who have been deprived of their property.

These rules have unique significance in class action cases, where the fundamental rights of tens of thousands of Michigan citizens are at stake. Under MCR 3.501(F), a class action complaint tolls the period of limitations for a class member's claim. This rule has been applied in cases involving almost every conceivable basis on which class action status might have been denied or terminated, including lack of typicality or commonality. *Hill v City of Warren*, 276 Mich App 299, 740 NW2d 706 (2007); see also *American Pipe & Constr v Utah*, 414 US 538 (1974) (holding under the analogous provisions of Fed. R. Civ. P. 23 that class members seeking to join a class after the running of the statutory limitations period are not required to "individually meet the timeliness requirements.") 414 U.S. at 550.[7] "To hold to the contrary would frustrate the principal function of a class suit[.]" *Id.* at 551.

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[6] See 42 USC § 2000e-5(f)(1), 42 U.S.C. § 1997(e), and Ga Code Ann § 48-5-380, respectively.

[7] The requirements for class certification under Michigan law are nearly identical to the federal requirements. *Henry v Dow Chem Co*, 484 Mich 483, 772 NW 2d 301 (2009). It is therefore reasonable to conclude that similar purposes, goals and cautions are applicable to both. *Id.*

Defendant argues that MCL 600.6431 stands as an independent bar to suit because class members whose rights would be preserved by the filing of this case did not themselves file individual notices or claims. The Supreme Court rejected nearly identical arguments in *American Pipe* because considerations of fairness and justice, which protect interests of parties who act in good faith, are "[d]eeply rooted in our jurisprudence." *American Pipe*, 414 US at 559.

CONCLUSION AND RELIEF SOUGHT

To correct the error in this case, and to ensure fair and consistent results in cases involving the notice provisions of MCL 600.6431, this Court should hold that a claim for damages based on the wrongful deprivation of property without due process accrues when the state actually deprives a claimant of property. In the alternative, claimants with timely claims should not deprived of their fundamental right to access the courts to vindicate their fundamental rights. Thus, if this Court denies leave, it should remand to the Court of Claims to determine if a putative class member with a timely claim should be substituted as a class representative.

Respectfully submitted,

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PROOF OF SERVICE

On October 17, 2017, I mailed and e-mailed one copy of Plaintiffs-Appellants' application for leave to appeal to:

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I declare that the statements above are true to the best of my knowledge, information and belief.

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INDEX OF EXHIBITS TO PLAINTIFFS-APPELLANTS' REPLY BRIEF

EXBHIBIT	DESCRIPTION
1	**Court of Claims Opinion dated October 26, 2016, *Mays, et al. v. Snyder, et al.*, Case No. 16-000017-MM (Boonstra, J.)**
2	**Court of Claims Opinion dated September 13, 2017, *Gulla, et al. v. Snyder, et al.*, Case No. 16-000298-MZ**

EXHIBIT 1

STATE OF MICHIGAN

COURT OF CLAIMS

MELISSA MAYS, MICHAEL ADAM MAYS, JACQUELINE PEMBERTON, KEITH JOHN PEMBERTON, ELNORA CARTHAN and RHONDA KELSO, Plaintiffs, v GOVERNOR RICK SNYDER, STATE OF MICHIGAN, MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY, MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES, DARNELL EARLEY and JERRY AMBROSE, Defendants.	**OPINION AND ORDER** Case No. 16-000017-MM Hon. Mark T. Boonstra

This putative class action arises out of the water contamination crisis commonly referred to as the "Flint Water Crisis." Plaintiffs commenced this litigation on behalf of the water users and property owners of the City of Flint. Named as defendants are various state defendants[1] and two former emergency managers of Flint. Plaintiffs seek, in part, to recover monetary damages attributable to alleged violations of the due process and fair and just treatment clauses of Const

[1] The state defendants are: Governor Rick Snyder, the State of Michigan, the Michigan Department of Environmental Quality, and the Michigan Department of Health and Human Services. This use of the term "state defendants" in this opinion derives from the manner in which the parties have identified themselves in the briefing of the pending motions, and is not indicative of any conclusion by the Court on the issue presented regarding whether the former emergency manager defendants are state or local officials. That issue will be discussed later in this opinion and without regard to the characterization of certain named defendants as the "state defendants."

1963, art 1, § 17, and the taking clause of Const 1963, art 10, § 2. Before the Court are dual motions seeking summary disposition pursuant to MCR 2.116(C)(4) (lack of jurisdiction), (C)(7) (immunity granted by law) and (C)(8) (failure to state a claim); one is brought by the state defendants and one is brought by the former emergency managers, Darnell Earley and Jerry Ambrose. For the reasons detailed in this opinion, the Court GRANTS summary disposition in favor of all defendants on Counts I and III of plaintiffs' first amended complaint. The Court DENIES summary disposition, as to all defendants, without prejudice, on Counts II and IV.[2]

I. FACTUAL BACKGROUND

Because the instant matter presents on motions for summary disposition that were filed at an early stage of this litigation, the factual record is yet to be developed. For the limited purpose of providing context for the rulings that follow with regard to the merits of defendants' motions for summary disposition brought pursuant to MCR 2.116(C)(8), the Court accepts as true, as it must (for purposes of the pending motions), plaintiffs' well-pleaded allegations and views those allegations in a light most favorable to plaintiffs. In doing so, the Court acknowledges that defendants offer a different view of the facts; the state defendants expressly maintain, for example, that "the State and Governor recognize the seriousness of these issues," and recite to a

[2] Defendants Earley and Ambrose also seek summary disposition with regard to plaintiffs' request for injunctive relief. That request for summary disposition is not properly before the Court. "It is well settled that an injunction is an equitable remedy, not an independent cause of action." *Terlecki v Stewart*, 278 Mich App 644, 663; 754 NW2d 899 (2008). Summary disposition may be granted with respect to a claim or a defense. MCR 2.116(B)(1). A remedy is neither a claim nor a defense and, thus, is not subject to summary disposition. Consequently, the Court concludes that the summary disposition request is improperly brought as it pertains to the request for injunctive relief. The propriety of the remedy of injunctive relief is more properly addressed after a finding, if any, of liability.

number of steps that they maintain have been taken that "demonstrate[] their commitment to resolving the crisis;" similarly, defendants Earley and Ambrose offer that "[t]he Flint Water Crisis has resulted in the mass mobilization of resources by city, county, state, federal, and non-governmental actors as they work to protect the residents of the City of Flint . . . and Genesee County, identify the root causes of the Crisis, prevent its reoccurrence, and address the long term issues that have resulted or will result." In any event, having acknowledged that the parties hold differing perspectives regarding the facts and circumstances that have given rise to this litigation, the Court reiterates that it is its obligation at this juncture of the proceedings to accept plaintiffs' factual allegations as true for purposes of a (C)(8) motion, and the Court therefore will not in this opinion further summarize defendants' factual contentions. Rather, the factual recitation that follows is, for the reasons noted, derived entirely from plaintiffs' first amended complaint. The reader should therefore appreciate that, for these reasons, and given the early stage of this litigation, this factual description does not reflect any findings by the Court.

From 1964 through late April 2014, the Detroit Water and Sewage Department ("DWSD") supplied Flint water users with their water, which was drawn from Lake Huron. Flint joined Genesee, Sanilac and Lapeer Counties and the City of Lapeer, in 2009, to form the Karegondi Water Authority ("KWA") to explore the development of a water delivery system that would draw water from Lake Huron and serve as an alternative to the Detroit water delivery system. On March 28, 2013, the State Treasurer recommended to the Governor that he authorize the KWA to proceed with its plans to construct the alternative water supply system. The State Treasurer made this decision even though an independent engineering firm commissioned by the State Treasurer had concluded that it would be more cost efficient if Flint continued to receive its water from the DWSD. Thereafter, on April 16, 2013, the Governor authorized then-Flint

Emergency Manager Edward Kurtz to contract with the KWA for the purpose of switching the source of Flint's water from the DWSD to the KWA beginning in mid-year 2016.

At the time Emergency Manager Kurtz contractually bound Flint to the KWA project, the Governor and various state officials knew that the Flint River would serve as an interim source of drinking water for the residents of Flint. Indeed, the State Treasurer, the emergency manager and others developed an interim plan to use Flint River water before the KWA project became operational. They did so despite knowledge of a 2011 study commissioned by Flint officials that cautioned against the use of Flint River water as a source of drinking water and despite the absence of any independent state scientific assessment of the suitability of using water drawn from the Flint River as drinking water.

On April 25, 2014, under the direction of then Flint Emergency Manager Earley and the Michigan Department of Environmental Quality ("MDEQ"), Flint switched its water source from the DWSD to the Flint River and Flint water users began receiving Flint River water from their taps. This switch was made even though Michael Glasgow, the City of Flint's water treatment plant's laboratory and water quality supervisor, warned that Flint's water treatment plant was not fit to begin operations. The 2011 study commissioned by city officials had noted that Flint's long dormant water treatment plant would require facility upgrades costing millions of dollars.

Less than a month later, state officials began to receive complaints from Flint water users about the quality of the water coming out of their taps. Flint residents began complaining in June of 2014 that they were becoming ill after drinking the tap water. On October 13, 2014, General Motors announced that it was discontinuing the use of Flint water in its Flint plant due to concerns about the corrosive nature of the water. That same month, Flint officials expressed

concern about a Legionellosis outbreak and possible links between the outbreak and Flint's switch to the river water. On February 26, 2015, the United States Environmental Protection Agency ("EPA") advised the MDEQ that the Flint water supply was contaminated with iron at levels so high that the testing instruments could not measure the exact level. That same month, the MDEQ was also advised of the opinion of Miguel Del Toral of the EPA that black sediment found in some of the tap water was lead.

During this time, state officials failed to take any significant remedial measures to address the growing public health threat posed by the contaminated water. Instead, state officials continued to downplay the health risk and advise Flint water users that it was safe to drink the tap water while at the same time arranging for state employees in Flint to drink water from water coolers installed in state buildings. Additionally, the MDEQ advised the EPA that Flint was using a corrosion control additive with knowledge that the statement was false.

By early March 2015, state officials knew they faced a public health emergency involving lead poisoning and the presence of the deadly Legionella bacteria, but actively concealed the health threats posed by the tap water, took no measures to effectively address the dangers, and publically advised Flint water users that the water was safe and that there was no widespread problem with lead leaching into the water supply despite knowledge that these latter two statements were false.

Through the summer and into the fall of 2015, state officials continued to cover up the health emergency, discredit reports from Del Toral of the EPA and Professor Marc Edwards of Virginia Tech confirming serious lead contamination in the Flint water system, conceal critical information confirming the presence of lead in the water system, and advise the public that the

drinking water was safe despite knowledge to the contrary. In the fall of 2015, various state officials attempted to discredit the findings of Dr. Mona Hann-Attisha of Hurley Hospital, which reflected a "spike in the percentage of Flint children with elevated blood lead levels from blood drawn in the second and third quarter of 2014." (First Amended Complaint, p 21, ¶ 102.)

In early October of 2015, however, the Governor acknowledged that the Flint water supply was contaminated with dangerous levels of lead. He ordered Flint to reconnect to the Detroit water system on October 8, 2015, with the reconnection taking place on October 16, 2015. This suit followed.

II. SUMMARY DISPOSITION STANDARDS

Summary disposition is appropriate under MCR 2.116(C)(4) when the trial court lacks subject matter jurisdiction. *Packowski v United Food and Commercial Workers Local 951*, 289 Mich App 132, 138; 796 NW2d 94 (2010). To determine whether summary disposition is appropriate under this subrule, this Court must determine whether the affidavits, together with the pleadings, depositions, admissions, and documentary evidence, demonstrate a lack of subject matter jurisdiction. *Id.* at 139 (internal quotation marks and citation omitted).

A motion for summary disposition brought pursuant to MCR 2.116(C)(7) (on which defendants rely in this case in asserting "immunity granted by law") requires this Court to accept as true the well-pleaded allegations of plaintiffs and to construe those allegations in favor of plaintiffs, unless the allegations are specifically contradicted by the affidavits or other appropriate documentation submitted by the movant. *Adair v State of Michigan*, 250 Mich App 691, 702; 651 NW2d 393 (2002), aff'd in part and rev'd in part on other grounds 470 Mich 105 (2004). "If the pleadings demonstrate that a party is entitled to judgment as a matter of law, or if

the affidavits or other documentary evidence show that there are no genuine issues of fact, judgment must be rendered without delay." *Id.*

A trial court may grant summary disposition under MCR 2.116(C)(8) if the opposing party has failed to state a claim on which relief can be granted. *Dalley v Dykema Gossett, PLLC*, 287 Mich App 296, 304; 788 NW2d 679 (2010). When deciding a motion brought under this subrule, this Court accepts all well-pleaded factual allegations as true and views those allegations in a light most favorable to the nonmoving party. *Id.* at 304-305. A party may not support a motion under subrule (C)(8) with documentary evidence. *Id.* at 305. Summary disposition should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Id.*

III. JURISDICTIONAL ISSUES

A. The Notice Requirement of MCL 600.6431(3)

Generally, governmental entities in Michigan are statutorily immune from tort liability. Because the government may voluntarily subject itself to tort liability, however, it may also place conditions or limitations on the liability imposed. *McCahan v Brennan*, 492 Mich 730, 736; 822 NW2d 747 (2012). Moreover, "it being the sole province of the Legislature to determine whether and on what terms the state may be sued, the judiciary has no authority to restrict or amend those terms." *Id.* at 732. In other words, "no judicially created savings construction is permitted to avoid a clear statutory mandate." *Id.* at 733. Thus, courts may not engraft an actual prejudice requirement or otherwise reduce the obligation to fully comply with the legislatively-imposed conditions or limitations. *Id.* at 747.

One such condition precedent on the right to sue the state is satisfaction of the notice provision of the Court of Claims Act, MCL 600.6431. *McCahan*, 492 Mich at 736; see also, *Fairley v Dep't of Corrections*, 497 Mich 290, 292; 871 NW2d 129 (2015). The notice provision at issue in this litigation provides: "In all actions for property damage or personal injuries, claimant shall file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within 6 months following the happening of the event giving rise to the cause of action." MCL 600.6431(3). This provision applies to constitutional torts. *Rusha v Dep't of Corrections*, 307 Mich App 300, 301, 304; 859 NW2d 735 (2014). "Section 6431(3) is an unambiguous 'condition precedent to sue the state,' *McCahan v Brennan*, 291 Mich App 430, 433; 804 NW2d 906 (2011), aff'd 492 Mich 730 (2012), and a claimant's failure to comply strictly with this notice provision warrants dismissal of the claim, even if no prejudice resulted, *McCahan v Brennan*, 492 Mich 730, 746-747; 822 NW2d 747 (2012)." *Rusha*, 307 Mich App at 307. "[S]ubstantial compliance does not satisfy MCL 600.6431(3)." *McCahan*, 291 Mich App at 433.

Plaintiffs commenced the instant suit on January 21, 2016.[3] According to defendants, the six-month notice period set forth in MCL 600.6431(3) began to run either in June of 2013, the date on which plaintiffs allege that "the State created a dangerous public health crisis for the users of Flint tap water" by "order[ing] and set[ting] in motion the use of highly corrosive and toxic Flint River water knowing that the [water treatment plant] was not ready" (First Amended

[3] Plaintiffs did not separately file a "notice of intention to file a claim," MCL 600.6431(1), (3). Rather, plaintiffs allege that their "original Complaint [wa]s filed within six months of the accrual of Plaintiffs' claim and satisfies all timeliness requirements of MCL §§ 600.6431 . . . ." (First Amended Complaint, p 7, ¶ 34).

Complaint, p 12, ¶ 59), or on April 25, 2014, the date Flint water users began receiving Flint River water from their taps (First Amended Complaint, p 12, ¶¶ 58-59). Regardless of which date is selected, defendants assert that the conclusion in the same: plaintiffs failed to file the requisite notice within six months of either date and, therefore, their complaint must be dismissed in its entirety pursuant to MCR 2.116(C)(4) and (7). The Court is unpersuaded by defendants' argument. Were the Court to accept defendants' position, it would have to find that plaintiffs' claims are barred because they should have filed suit (or notice) at a time when the state itself was stating that it lacked any reason to know that the water supply was contaminated. The Court is disinclined to so find. Rather, the Court finds that defendants' request for summary disposition on this ground is at best premature for the reasons that follow.

Plaintiffs assert only constitutional claims. In *Rusha*, the Court of Appeals acknowledged that "Michigan courts routinely enforce statutes of limitation where constitutional claims are at issue." *Rusha*, 307 Mich App at 311. The Court also acknowledged that an exception to such enforcement lies where it can be demonstrated that a statute of limitations is so harsh and unreasonable in the consequences that it "effectively divest[s]" a plaintiff "of the access to the courts intended by the grant of the substantive right." *Rusha*, 307 Mich App at 311 (citations and internal punctuation omitted). The Court then observed that no obvious reason existed not to extend this exception to statutory notice requirements, particularly the notice requirements of MCL 600.6431(3). The Court elaborated:

> We see no reason – and plaintiff has provided none – to treat statutory notice requirements differently. Indeed, although statutory notice requirements and statutes of limitations do not serve identical objectives, *Davis v Farmers Ins Group*, 86 Mich App 45, 47; 272 NW2d 334 (1978), both are *procedural* requirements that ultimately restrict a plaintiff's remedy, but not the substantive right. See [*American States Ins Co v Dep't of Treasury*, 220 Mich App 586, 599; 560 NW2d 644 (1996)] (statutory notice periods are " 'devices . . . which have the

> effect of shortening the period of time set forth in' statutes of limitation") (omission in *American States*), quoting *Carver v McKernan*, 390 Mich 96, 99; 211 NW2d 24 (1973), overruled on other grounds by [*Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 213, 222-223; 731 NW2d 41 (2007)]; see also *Brown v United States*, 239 US App DC 345, 362; 742 F2d 1498 (1984) (en banc) (Bork, J., dissenting) ("Like statutes of limitations, notice-of-claims provisions go primarily to remedy.") (citation omitted). [*Rusha*, 307 Mich App at 311-312 (emphasis in original).]

The Court then concluded, however, that on the facts presented, there was no reason to relieve the plaintiff in that case from compliance with the notice requirement. The Court explained:

> Here, it can hardly be said that application of the six-month notice provision of § 6431(3) effectively divested plaintiff of the ability to vindicate the alleged constitutional violation or otherwise functionally abrogated a constitutional right. Again, plaintiff waited nearly 28 months to file a claim. But § 6431 would have permitted him to file a claim on this very timeline had he only provided notice of his intent to do so within six months of the claim's accrual. Providing such notice would have imposed only a minimum procedural burden, which in any event would be significantly less than the "minor 'practical difficulties' facing those who need only make, sign and file a complaint within six months." *Brown*, 239 US App DC at 365 (Bork, J., dissenting), quoting *Burnett v Grattan*, 468 US 42, 51; 104 S Ct 2924; 82 L Ed 36 (1984). To be sure, providing statutory notice " 'requires only ordinary knowledge and diligence on the part of the injured and his counsel, and there is no reason for relieving them from the requirements of this [statutory notice provision] that would not be applicable to any other statute of limitation.' " *Rowland*, 477 Mich at 211, quoting *Ridgeway v Escanaba*, 154 Mich 68, 73; 117 NW 550 (1908). [*Rusha*, 307 Mich App at 312-313.]

In the present litigation, unlike in *Rusha*, a granting of summary disposition at this stage of the proceedings could potentially divest plaintiffs of the ability to vindicate the alleged constitutional violations by depriving them of access to the courts. Unlike a suit, for example, brought to recover for personal injuries sustained in an automobile accident where the event giving rise to the cause of action is the accident, *McCahan*, 492 Mich at 734; *Kline v Dep't of Transportation*, 291 Mich App 651, 652, 654, 657 n 1; 809 NW2d 392 (2011), in the present suit the event giving rise to the cause of action was not readily apparent at the time of its happening. Similarly, a significant portion of the injuries alleged to persons and property likely became

manifest so gradually as to have been well established before becoming apparent to plaintiffs because the evidence of injury was concealed in the water supply infrastructure buried beneath Flint and in the bloodstreams of those drinking the water supplied via that infrastructure. Matters are further complicated by allegations of affirmative acts undertaken by a variety of state actors between April 25, 2014 and October of 2015, not only to conceal the fact that the tap water was contaminated and posed a threat to the health of all who drank it, but to obfuscate the occurrence of the very event or events that would trigger the running of the six-month notice period. Under these unique circumstances, and assuming plaintiffs' allegations to be true, providing statutory notice would have required much more than "only ordinary knowledge and diligence on the part of the injured and [their] counsel," such that there indeed is "reason for relieving them from the requirements of this [statutory notice provision]." *Rusha*, 307 Mich App at 312 (citations and internal quotation marks omitted). Rather, and again under these unique circumstances, and assuming plaintiffs' allegations to be true, such affirmative acts of concealment and obfuscation would "effectively divest[] plaintiff[s] of the ability to vindicate the alleged constitutional violation or otherwise functionally abrogate[] a constitutional right," *id.*, if permitted to further become a vehicle for manipulating the date on which the notice period began to run, only to then reward those acts by dismissing the claims of ordinary citizens who possessed less information about the events than did the state actors themselves. See e.g., *The Cooke Contracting Co v Dep't of State Highways #1 (On Rehearing)*, 55 Mich App 336, 339; 222 NW2d 231 (1974).[4] In

[4] In so concluding, the Court does not adopt and, to the contrary, rejects plaintiffs' argument that the fraudulent concealment tolling provision found in MCL 600.5855 should be applied in this case. MCL 600.5855 extends the time for commencing an action, notwithstanding that it "would otherwise be barred by the period of limitations," "[i]f a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable

light of these circumstances and the Court's review of the allegations contained in plaintiffs' first amended complaint and the content of the documentary evidence presented by the parties, the Court finds, at a minimum, that there are fact questions that if answered favorably to plaintiffs would, under the established exception recognized by existing caselaw, justify "relieving [plaintiffs] from the requirements of" MCL 600.6431(3). *Rusha*, 307 Mich App at 312.[5]

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for the claim from the knowledge of the person entitled to sue on the claim." The Court of Appeals has twice declined to import this provision into MCL 600.6431 because the latter provision is a notice provision and not a statute of limitation provision. See *Brewer v Central Michigan Univ Bd of Trustees*, unpublished opinion per curiam of the Court of Appeals, issued November 21, 2013 (Docket No. 312374), unpub op at 2-3; *Zelek v State of Michigan*, unpublished opinion per curiam of the Court of Appeals, issued October 16, 2012 (Docket No. 305191), unpub op at 2. Although "[a]n unpublished opinion is not precedentially binding under the rule of stare decisis," MCR 7.215(C)(1), an unpublished opinion can be instructive or persuasive, *Paris Meadows, LLC v Kentwood*, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010). More telling, however, is the fact that the Legislature imported the fraudulent concealment provision into the statute of limitation provisions of the Court of Claims Act, MCL 600.6452(2); MCL 600.5855, but not into the notice provisions of the Act. The absence of such a similar provision is persuasive evidence that the Legislature did not intend for the fraudulent concealment tolling provision of MCL 600.5855 to be read into the notice provisions of MCL 600.6431.

Yet, while the Court of Appeals in *Brewer* and *Zelek* properly declined to import the fraudulent concealment tolling provision of MCL 600.5855 into the notice provisions of the Court of Claims Act, MCL 600.6431, the Court finds it noteworthy, as did the Court of Appeals in *Brewer*, that the plaintiff in that case had timely knowledge of his injuries yet waited years before asserting (or giving notice of) his claim. Further, the claim in *Zelek* arose from a motor vehicle accident, an identifiable event of which the plaintiff obviously was aware at the time of its occurrence. Although the plaintiff claimed that she should have been advised that the vehicle with which she had collided was an unmarked state police vehicle, the accident reports sufficiently identified the vehicle and driver that the plaintiff with due diligence could have ascertained that she was required to file a timely notice in the Court of Claims. Thus, the unique and distinctive circumstances of the instant case stand in stark contrast to the very distinguishable circumstances that were present in *Brewer* and *Zelek*, and while those cases properly support the non-importation of the tolling provisions of MCL 600.5855 into the notice provisions of MCL 600.6431, they do not in any way address or undermine this Court's recognition and application of the established exception recognized in *Rusha*.

[5] The Court notes that the Michigan Supreme Court denied leave to appeal in *Rusha*. See, *Rusha*, 498 Mich 860; 865 NW2d 28 (2015).

Nevertheless, even if strict compliance with the notice requirements were required, the Court concludes that summary disposition would still be premature. Plaintiffs acknowledge that not every injury suffered by every user of Flint water is necessarily actionable, depending on when the actionable event(s) occurred, when each user suffered injury, and when the claim(s) of each accrued, relative to the filing of notice (or of the claim). Some injuries suffered by some plaintiffs or putative class members may thus be actionable, while other injuries experienced by those or other plaintiffs or putative class members may not be actionable, depending on the various factors giving rise to the cause of action. Under such circumstances, at a minimum, material fact questions exist with regard to whether (and which) plaintiffs complied with the notice requirement, and as to which claim(s), such that summary disposition on all counts of plaintiffs' first amended complaint, on that ground, would be inappropriate at this time. The record is simply insufficiently developed for this Court to determine, at this juncture, which claims of which plaintiffs or putative class members may not be viable as not timely filed within the six-month notice provision of MCL 600.6431(3).

For these reasons, summary disposition pursuant to MCR 2.116(C)(4) and (7) based on an application of the six-month notice provision is denied.

B. Emergency Managers

The state defendants assert that the Court of Claims lacks subject matter jurisdiction over plaintiffs' claims against defendants Earley and Ambrose because neither former emergency manager acted in the capacity of a state officer while serving Flint in the office of emergency manager. Rather, the state defendants argue that defendants Earley and Ambrose, when acting as

emergency managers for the City of Flint, "were local, not state, officials."[6] For this reason, the state defendants assert that summary disposition pursuant to MCR 2.116(C)(4) is appropriate as to defendants Earley and Ambrose on all counts of plaintiffs' first amended complaint. This Court disagrees with the underlying premise of the state defendants' argument, and therefore declines to grant summary disposition in favor of defendants Earley and Ambrose on this ground.

Under MCL 600.6419(1)(a), the Court of Claims possesses exclusive subject-matter jurisdiction to hear and determine "any claim or demand, statutory or constitutional, liquidated or unliquidated, ex contractu or ex delicto, or any demand for monetary, equitable or declaratory relief . . . against the state or any of its departments or officers." See also, *Fulicea v Michigan*, 308 Mich App 230, 231; 863 NW2d 385 (2014). The Legislature defined the phrase "the state or any of its departments or officers" in MCL 600.6419(7). In relevant part, that phrase means "this state or any state governing, legislative, or judicial body, department, commission, board, institution, arm, or agency of the state, or an officer, employee, or volunteer of this state . . . ." MCL 600.6419(7).

[6] The state defendants advance this argument not in support of their own motion for summary disposition, but instead in response to the separate motion for summary disposition filed by defendants Earley and Ambrose. Defendants Earley and Ambrose do not make the same argument, and the state defendants acknowledge that Earley and Ambrose "accept . . . as accurate" plaintiffs' contention that the emergency managers were acting as "official agents/policymakers for the State of Michigan." (First Amended Complaint, p 7, ¶ 29).

The Court finds that defendants Earley and Ambrose operated as officers of the state, while executing their responsibilities as emergency managers and overseeing the receivership[7] of Flint. As observed by this Court in its prior decision in *Collins v City of Flint*, 16-000115-MZ, its finding is consistent with

> the long-recognized principle that a receiver serves as the administrative or ministerial arm or officer of the authority exercising the power of appointment. See *Arbor Farms, LLC v Geostar Corp*, 305 Mich App 374, 392; 853 NW2d 421 (2014) (A receiver serves as an arm of the court.); *In re Guaranty Indemnity Co*, 256 Mich 671, 673; 240 NW 78 (1932) ("Generally speaking a receiver is not an agent, except of the court appointing him[.] He is merely a ministerial officer of the court, or, as he is sometimes called, the hand or arm of the court."); *Woodliff v Frechette*, 254 Mich 328, 329; 236 NW2d 799 (1931) (A receiver serves as an arm of the court.); *Detroit Trust Co v Wayne Circuit Judge*, 223 Mich 49, 52; 193 NW 879 (1923) (A receiver serves as an arm of the court.); *Band v Livonia Associates*, 176 Mich App 95, 108; 439 NW2d 285 (1989) ("A receiver is sometimes said to be the arm of the court . . . ."). [*Collins*, 8/25/16 opinion & order, pp 12-13.]

The Court's finding is also supported by the provisions of the local financial stability and choice act, MCL 141.1541 et seq. Again, as explained in *Collins*,

> [a]n emergency manager is a creature of the Legislature with only the power and authority granted by statute. *Kincaid v City of Flint*, 311 Mich App 76, 87; 874 NW2d 193 (2015). An emergency manager is appointed by the governor following a determination by the governor that a local government is in a state of financial emergency. MCL 141.1546(1)(b); MCL 141.1549(1). The emergency manager serves at the governor's pleasure. MCL 141.1515(5)(d); MCL 141.1549(3)(d); *Kincaid*, 311 Mich App at 88. The emergency manager can be removed by the governor or by the Legislature through the impeachment process. MCL 141.1549(3)(d) and (6)(a). The state provides the financial compensation for the emergency manager. MCL 141.1549(3)(e) and (f). All powers of the emergency manager are conferred by the Legislature. MCL 141.1549(4) and (5); MCL 141.1550 – MCL 141.1559; *Kincaid*, 311 Mich

[7] The local financial stability and choice act, MCL 141.1541 et seq., which provides for the appointment of emergency managers, describes the resulting state of affairs as a "receivership." MCL 141.1549(2); MCL 141.1542(q).

> App at 87. Those powers include powers not traditionally within the scope of those granted municipal corporations. See MCL 141.1552(1)(a) – (ee). The Legislature conditioned the exercise of some of those powers upon the approval of the governor or his or her designee or the state treasurer. MCL 141.1552(1)(f), (x), (z) and (3); MCL 141.1555(1). The Legislature has also subjected the emergency manager to various codes of conduct otherwise applicable only to public servants, public officers and state officers. MCL 141.1549(9). Through the various provisions within the act, the state charges the emergency manager with the general task of restoring fiscal stability to a local government placed in receivership – a task which protects and benefits both the state and the local municipality and its inhabitants. The emergency manager is statutorily obligated to create a financial and operating plan for the local government that furthers specific goals set by the state and to submit a copy of the plan to the state treasurer for the treasurer's "regular[] reexamin[ation]." MCL 141.1551(2). The emergency manager is also obligated to report to the top elected officials of this state and to the state treasurer his or her progress in restoring financial stability to the local government. MCL 141.1557. Finally, the Act tasks the governor, and not the emergency manager, with making the final determination whether the financial emergency declared by the governor has been rectified by the emergency manager's efforts. MCL 141.1562(1) and (2). Under the totality of these circumstances, the core nature of the emergency manager may be characterized as an administrative officer of state government. See 65 Am Jur 2d, Receivers, § 128, p 745 (A receiver's duties are administrative in nature.). [*Collins*, 8/25/16 opinion & order, pp 13-14.]

For the foregoing reasons, and at all times relevant to this action, defendants Earley and Ambrose acted as state officers while executing their duties as an emergency manager. Consequently, this Court has jurisdiction over plaintiffs' claims against the former emergency managers. Summary disposition pursuant to MCR 2.116(C)(4) is denied.[8]

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[8] Among the arguments advanced by the state defendants for the proposition that emergency managers are local, not state, officials, is the fact that, according to the state defendants, "[t]he Legislature expressly requires the *local*, not state government, to represent emergency managers and pay for judgments against them. MCL 141.1560(5)." The Court rejects the state defendants' position that the Legislature's creation of such a "liability arrangement," to use the state defendants' terminology, converts the emergency managers into local, rather than state, officials for purposes of this action. Conceivably, issues may arise at some juncture regarding whether the state may have a claim for those damages, if any, or those litigation expenses, if any, that may arise out of the actions or defense of defendants Earley and Ambrose. However, those

IV. CONSTITUTIONAL TORTS

Plaintiffs advance three theories of recovery under Const 1963, art 1, § 17: first, in Count I, a constitutional tort predicated on an application of the state-created danger theory; second, in Count II, a constitutional tort predicated on a violation of the protection afforded to an individual's bodily integrity by the substantive component of the due process clause; and third, in Count III, a constitutional tort predicated on a violation of the fair and just treatment clause. The Court agrees with defendants that plaintiffs have failed to state a claim with regard to Counts I and III of their first amended complaint. Defendants are entitled to summary disposition with regard to those counts pursuant to MCR 2.116(C)(8). With regard to Count II, however, the Court finds that plaintiffs have properly pleaded a cognizable substantive due process claim for a violation of their respective individual rights to bodily integrity. Summary disposition is inappropriate with regard to Count II.

A. General Principles

Under Michigan law, it is settled that a damage remedy for a violation of the Michigan Constitution may be recognized against the state in appropriate cases. *Jones v Powell*, 462 Mich 329, 336; 612 NW2d 423 (2000); *Smith v Dep't of Public Health*, 428 Mich 540, 544; 410 NW2d 749 (1987), aff'd sub nom *Will v Dep't of State Police*, 491 US 58, 109 S Ct 2304, 105 L Ed 2d 45 (1989). "[T]he state will be liable for a violation of the state constitution only 'in cases where a state "custom or policy" mandated the official or employee's action.' " *Carlton v Dep't of Corrections*, 215 Mich App 490, 505; 546 NW2d 671 (1996), quoting *Smith*, 428 Mich at 642

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issues are not currently before the Court, and the Court expressly declines to address them at this time.

(Opinion by BOYLE, J.). Moreover, "[t]he tortious conduct alleged 'must do more than show that the government actor intentionally or recklessly caused injury to the plaintiff by abusing or misusing *government* power . . . . [I]t must demonstrate a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking.' " *Williams v Berney*, 519 F3d 1216, 1221 (CA 10, 2008), quoting *Livesy v Salt Lake Co*, 275 F3d 952, 957-958 (CA 10, 2001); see also, *Collins v City of Harker Heights*, 503 US 115, 128; 112 S Ct 1061; 117 L Ed 2d 261 (1992) (The substantive component of the federal Due Process Clause is violated by executive action only if it can be classified, in a constitutional sense, as arbitrary or shocking to the conscience.); *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 198-202; 761 NW2d 293 (2008) ("[W]hen executive action is challenged in a substantive due process claim, the claimant must show that the action was so arbitrary [in a constitutional sense] as to shock the conscience."). Whether conduct shocks the conscience depends on the matter at hand. *County of Sacramento v Lewis*, 523 US 833, 849; 118 S Ct 1708; 140 L Ed 2d 1043 (1998); *Williams*, 519 F3d at 1220-1221; *Robinson v Michigan*, unpublished opinion[9] per curiam of the Court of Appeals, issued November 7, 2006 (Docket No. 270781), unpub op at 3. "The case law . . . recognizes official conduct may be more egregious in circumstances allowing for deliberation . . . than in circumstances calling for quick decisions." *Williams*, 519 F3d at 1220-1221. "Substantive due process protections 'apply to transgressions above and beyond those covered by the ordinary civil tort system; the two are not coterminous.' " *Johnson v City of*

[9] "An unpublished opinion is not precedentially binding under the rule of stare decisis." MCR 7.215(C)(1). Unpublished opinions can be instructive or persuasive, however. *Paris Meadows, LLC v Kentwood*, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010).

Murray, 909 F Supp 2d at 1265, 1292 (DC Utah, 2012), aff'd 544 Fed Appx 801 (CA 10, 2013), quoting *Williams*, 519 F3d at 1221.

For purposes of deciding the merits of defendants' motions, the Court must determine whether a violation of the Michigan Constitution by virtue of a governmental custom or policy has been alleged with regard to each of the three constitutional torts asserted. *Smith*, 428 Mich at 545; *Johnson v Wayne Co*, 213 Mich App 143, 156; 540 NW2d 66 (1995); *Estate of Braman*, unpublished opinion per curiam of the Court of Appeals, issued March 1, 2012 (Docket Nos. 302545; 302622), unpub op at 7. If plaintiffs' allegations, when taken as true, are sufficient to sustain any of the claimed violations of art 1, § 17, then the Court must determine whether this case would be an appropriate one to recognize a damage remedy under art 1, § 17. *Estate of Braman*, unpub op at 7.

B. Count I - State-Created Danger

The state defendants assert that Count I of plaintiffs' first amended complaint must be summarily dismissed pursuant to MCR 2.116(C)(7) and (8) because plaintiffs have failed to satisfy the threshold criteria for the recognition of a viable cause of action under the state-created danger theory. It is unnecessary for this Court to reach the issue of whether such a cause of action is or should be recognized, however, because even if the state-created danger theory is a viable theory of recovery in Michigan, plaintiffs have not alleged, and cannot allege, facts to state a claim under the theory. Thus, Count I of plaintiffs' first amended complaint must be dismissed pursuant to MCR 2.116(C)(8).

The Michigan Constitution commands that the state cannot deprive any person of "life, liberty or property without due process of law." Const 1963, art 1, § 17. Substantive due

process protects the individual from arbitrary and abusive exercises of government power; certain fundamental rights cannot be infringed upon regardless of the fairness of the procedures used to implement them. *People v Sierb*, 456 Mich 519, 523; 581 NW2d 219 (1998).

The state-created danger theory has its genesis in *DeShaney v Winnebago Co Dep't of Social Services*, 489 US 189; 109 S Ct 998; 103 L Ed 2d 249 (1989). In *DeShaney*, the United States Supreme Court considered whether the due process clause of the Fourteenth Amendment imposed upon the states an affirmative duty to protect an individual against private violence where a special relationship exists between the state and private individual. A minor commenced suit against several social workers and other local officials after the boy was beaten and permanently injured by his father. The minor asserted that the social workers and other officials deprived him of his due process liberty interest when they failed to remove him from the custody of his father despite receiving complaints that the child was being abused by his father and despite having reason to believe that this was the case. *Id.*, 489 US at 191. The Supreme Court began its analysis by recognizing that the purpose of the Due Process Clause is to protect the people from the state, not to impose an affirmative obligation on the state to protect people from each other. *Id.*, 489 US at 195-196. Nevertheless, the Supreme Court noted that "in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals." *Id.*, 489 US at 198. The Court elaborated:

> [W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. . . . The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs – *e.g.*, food, clothing, shelter, medical care, and reasonable safety – it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. . . . The affirmative duty to protect arises not from the State's

> knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf. . . . In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf – through incarceration, institutionalization, or other similar restraint of personal liberty – which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.
>
> . . . Petitioners concede that the harms Joshua suffered occurred not while he was in the State's custody, but while he was in the custody of his natural father, who was in no sense a state actor. While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them. That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter. Under these circumstances, the State had no constitutional duty to protect Joshua. [*Id.*, 489 US at 199-201 (internal citations omitted).]

Applying these principles to the facts in *DeShaney*, the Supreme Court found no due process violation because the harms suffered by the child occurred while he was in the custody of his father and because the harm faced by the child was no greater due to any affirmative state action. *Id.*, 489 US at 201.

As observed in *Kneipp v Tedder*, 95 F3d 1199, 1205 (CA 3, 1996), "[i]n *DeShaney*, the Supreme Court left open the possibility that a constitutional violation might have occurred despite the absence of a special relationship when it stated: 'While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them.' " Various federal circuit courts of appeals have relied on this sentence from *DeShaney* as support for employing a state-created danger theory to establish a constitutional claim under 42 USC 1983, although the theory has yet to be recognized by the United States Supreme Court. *Walker v Detroit Pub School Dst*, 535 Fed Appx 461, 464 (CA 6, 2103); *Henry v City of Erie*, 728 F3d 275, 282 (CA 3, 2013); *Jane Doe 3*

v White, 409 Ill App 3d 1087; 951 NE2d 216, 230 (2011), aff'd 362 Ill Dec 484; 973 NE2d 880 (2012); *Aselton v Town of East Hartford*, 277 Conn 120, 134 n 8; 890 A2d 1250, 1258 n 8 (2006); *Nelson v Driscoll*, 295 Mont 363, 379-380; 983 P2d 972, 983 (1999). Although the state-created danger theory is recognized by most federal circuits, the test employed by the various circuits somewhat varies among jurisdictions. *Nelson*, 983 P2d at 983; compare *Henry*, 728 F3d at 282; *Cartwright v Marine City*, 336 F3d 487, 493 (CA 6, 2003); *Currier v Doran*, 242 F3d 905, 918 (CA 10, 2001); *Nelson*, 983 P2d at 983. The United States Court of Appeals for the Sixth Circuit has articulated the test as follows:

> To show a state-created danger, plaintiff must show: 1) an affirmative act by the state which either created or increased the risk that the plaintiff would be exposed to an act of violence by a third party; 2) a special danger to the plaintiff wherein the state's actions placed the plaintiff specifically at risk, as distinguished from a risk that affects the public at large; and 3) the state knew or should have known that its actions specifically endangered the plaintiff. [*Cartwright*, 336 F3d at 493.]

The Michigan Court of Appeals has applied this same test to claims brought under 42 USC 1983. See *Manuel v Gill*, 270 Mich App 355, 365-366; 716 NW2d 291 (2006), aff'd in part and rev'd in part 481 Mich 637 (2008); *Dean v Childs*, 262 Mich App 48, 54-57; 684 NW2d 894 (2004), rev'd in part on other grounds 474 Mich 914 (2005); *Buck v City of Highland Park*, unpublished opinion per curiam of the Court of Appeals, issued July 16, 2015 (Docket No. 320967), unpub op at 2-3; *Doe v State of Michigan*, unpublished opinion per curiam of the Court of Appeals, issued December 8, 2009 (Docket No 285274), unpub op at 1-3; *Lofton v Detroit Bd of Ed*, unpublished opinion per curiam of the Court of Appeals, issued September 30, 2008 (Docket No. 276449), unpub op at 7-9; *Robinson v State of Michigan*, unpublished opinion per curiam of the Court of Appeals, issued November 7, 2006 (Docket No. 270781), unpub op at 4-5; *Conley v Bobzean*, unpublished opinion per curiam of the Court of Appeals, issued January 12, 2006 (Docket No.

257276), unpub op at 5-6; *Rollo v Guerreso*, unpublished opinion per curiam of the Court of Appeals, issued August 25, 2005 (Docket No. 251826), unpub op at 6-7; *Fortune v City of Detroit Public Schools*, unpublished opinion per curiam of the Court of Appeals, issued October 12, 2004 (Docket No. 248306), unpub op at 2-4.

Defendants assert that plaintiffs have failed to state a claim under the state-created danger theory because plaintiffs have failed to allege that defendants' actions "created or increased the risk that plaintiff[s] would be exposed to an act of violence by a third party." Plaintiffs respond, however, that harm committed by a private third party is not a necessary requirement for the imposition of liability under the state-created danger theory. Plaintiffs refer this Court to *Stiles v Grainger Co, Tennessee*, 819 F3d 834, 854 (CA 6, 2016), wherein the Sixth Circuit set forth the elements of the state-created danger theory as follows:

> To prevail on a state-created danger theory, Plaintiffs must establish three elements: (1) an affirmative act that creates or increases the risk to the plaintiff, (2) a special danger to the plaintiff as distinguished from the public at large, and (3) the requisite degree of state culpability.

What plaintiffs fail to recognize is that *McQueen v Beecher Community Schools*, 433 F3d 460, 464 (CA 6, 2006), the case cited in *Stiles* to support the above-quoted statement of the elements of the offense, expressly states that "[l]iability under the state-created danger theory is predicated upon affirmative acts by the state which either create or increase the risk that an individual will be exposed to private acts of violence." (Quoting *Kallstrom v City of Columbus*, 136 F3d 1055, 1066 [CA 6, 1998]). They also fail to point out that *Stiles* itself involved a claim of third party violence, i.e., student-on-student sexual harassment. *Stiles*, 819 F3d at 840-847, 854-855. Thus, neither *Stiles* nor *McQueen* provides persuasive support for plaintiffs' assertion that a showing of harm inflicted by a private third party is not a prerequisite to an application of

the state-created danger theory. Under the applicable caselaw, the Court is therefore constrained from applying the theory as broadly as plaintiffs suggest it should apply, even though the very name of the theory, i.e. state-created danger, facially suggests that it could implicate what happened in Flint and even though other jurisdictions may not condition an application of the theory on the presence of private violence. See e.g., *Kneipp*, 95 F3d 1199.

The Court further declines to apply the theory expansively in light of the general reluctance of this state's appellate courts to expand the doctrine of substantive due process. *Sierb*, 456 Mich at 528, 531-533; *Smith*, 428 Mich at 544; *Bestway Recycling, Inc* v *State of Michigan*, unpublished opinion per curiam of the Court of Appeals, issued June 4, 2002 (Docket No. 226926), unpub op at 2. Likewise, the United States Supreme Court has underscored its own reluctance to expand the doctrine of substantive due process, explaining:

> As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended. . . . The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field. [*Collins v City of Harker Heights*, 503 US 115, 125; 112 S Ct 1061; 117 L Ed 2d 261 (1992).]

As noted, to the extent that the Michigan Court of Appeals has addressed the state-created danger theory, the Court has restricted its application to the more narrow application involving private violence. See e.g., *Manuel*, 270 Mich App at 367. Finally, this Court concludes that a narrow application of the theory is consistent with *DeShaney*. *DeShaney* expressly recognized a single exception to the general rule that a state's failure to protect an individual from private violence does not violate due process. That exemption applies whenever an individual suffers harm from private third-party violence while the state has physical custody of the victim and the aggressor through incarceration or institutionalization or other similar

restraint of personal liberty. *DeShaney*, 489 US at 195, 199-200. This general exception did not apply in *DeShaney* because the child was injured by an act of private violence while the child was outside state custody. Nevertheless, the *DeShaney* Court left open the possibility that a constitutional violation might have been cognizable under the circumstances present in *DeShaney*, despite the absence of a special relationship arising from a custodial situation, when it stated: "While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them." This comment informs the scope of the state-created danger theory. The genesis of the theory is in language cognizant that the dangers faced by the child in the free world were dangers associated with private violence. Under such circumstances, the quoted language suggests "a *narrow exception*, which applies only when a state actor affirmatively acts to create, or increase[] a plaintiff's vulnerability to danger from private violence. It does not apply when the injury occurs due to the action of another state actor." *Gray v Univ of Colorado Hosp Authority*, 672 F3d 909, 921 (CA 10, 2012), quoting *Moore v Guthrie*, 438 F3d 1036, 1042 (CA 10, 2006) (italics in original).

For these reasons, the Court concludes that if the state-created danger tort is a cognizable constitutional tort in Michigan, the tort would be narrow in scope and limited to circumstances involving a state actor's affirmative acts that either created or increased the risk that the plaintiff would be exposed to an act of private violence. Inasmuch as this Court is bound to apply the law as it exists, any expansion of the scope of that constitutional tort must come from a higher court. Because plaintiffs have not alleged any harm caused by private violence, summary disposition is appropriate, in favor of all defendants, on Count I of plaintiffs' first amended complaint, pursuant to MCR 2.116(C)(8).

C. Count II - Injury to Bodily Integrity

The state defendants assert that Count II of plaintiffs' first amended complaint must be summarily dismissed pursuant to MCR 2.116(C)(7) and (8) because plaintiffs have failed to satisfy the threshold criteria for the recognition of a viable cause of action for a violation of their respective individual rights to bodily integrity under the substantive due process component of Const 1963, art 1, § 17. Defendants further assert that Count II must be summarily dismissed pursuant to MCR 2.116(C)(8) because plaintiffs have not stated, and cannot state, a cause of action for damages. The Court finds defendants' arguments unpersuasive.

1. Requirements for Establishing the Constitutional Tort

The Court begins its analysis of the merits of defendants' arguments by examining the allegations of a substantive due process violation. *Estate of Braman*, unpub op at 7. Substantive due process has long been recognized, at least in the context of the federal constitution, as encompassing a "right to bodily integrity." See, e.g., *Albright v Oliver*, 510 US 266, 272; 114 S Ct 807; 127 L Ed 2d 114 (1994); *Sierb*, 456 Mich at 523, 529 (interpreting the Michigan due process provision as "coextensive with the federal provision"). As observed above, an actionable constitutional tort does not exist unless a state "custom or policy" mandated the actions of the governmental official or employee and, thus, was the "moving force behind the constitutional violation." *Carlton*, 215 Mich App at 505. A government's policy or custom may be "made by its lawmakers or by those whose acts or edicts may fairly be said to represent official policy." *Monell v New York City Dep't of Social Services*, 436 US 658, 694; 98 S Ct 2018; 56 L Ed 2d 611 (1978). A single decision by such a body "unquestionably constitutes an act of official government policy" regardless whether that body had taken similar action in the

past or intended to do so in the future. *Pembaur v City of Cincinnati*, 475 US 469, 480; 106 S Ct 1292; 89 L Ed 2d 452 (1986). "To be sure, 'official policy' often refers to formal rules or understandings – often but not always committed to writing – that intended to, and do, establish fixed plans of action to be followed under similar circumstances consistently and over time." *Id.*, 475 US at 480-481. In other words, "[i]f a decision to adopt that particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of government 'policy' as that term is commonly understood." *Id.*, 475 US at 481.

In the present suit, plaintiffs allege that the Governor and the State Treasurer approved Flint's participation in the KWA's water delivery system, and that the State Treasurer, the emergency managers and other state officials, including state officials employed by the MDEQ, developed an interim plan to use Flint River water before the KWA project became operational and, through the implementation of that plan, delivered Flint River water to the taps of the Flint water users. These allegations, taken as true, establish a series of decisions to adopt a particular course of action made by the state's authorized decision-makers and, thus, establish the existence of state policies. These policies played a role in the alleged violation of plaintiffs' constitutional rights and the infliction of injury. Likewise, the alleged decisions of various state officials to defend the original decision to switch to using the Flint River as a water source, to resist a return to the Detroit water distribution system, to downplay and discredit accurate information gathered by outside experts regarding lead in the water supply and elevated lead levels in the bloodstreams of Flint's children, and to continue to reassure the Flint water users that the water was safe and not contaminated with lead or Legionella bacteria, played a role in the alleged violation of plaintiffs' constitutional rights and the infliction of injury. With regard to allegations of covering up the health crisis created by the switch to Flint River water, plaintiffs

allege a coordinated effort involving, among others, MDEQ's Chief of Office of Drinking Water and Municipal Assistance Liane Shekter-Smith, MDEQ's Water Treatment Specialist Patrick Cook, MDEQ District Supervisor Stephen Busch, MDEQ Engineer assigned to Genesee County Michael Prysby, MDEQ spokesperson Brad Wurfel, and Michigan Department of Health and Human Services Director Nick Lyon. These latter allegations are sufficient, when taken as true, to establish a decision to adopt a particular course of action made by the state's authorized decision-makers and, thus, establish that the state officers and employees' alleged tortious conduct occurred while implementing a state policy.

The Court also concludes that plaintiffs have pleaded sufficient facts, if proven, that the actions taken by the state actors were so arbitrary, in a constitutional sense, as to shock the conscience. Plaintiffs allege that it was state actors who made the decision to switch to the Flint River as the source of drinking water, after a period of deliberation, despite knowledge of the danger posed by the water, without a state-conducted scientific assessment of the suitability of using water from the Flint River as drinking water and with knowledge of the inadequacies of Flint's water treatment plant. They also allege that various state actors intentionally concealed data and made false statements in an attempt to downplay the health dangers posed by using Flint's tap water, despite possessing scientific data and actual knowledge that the water supply reaching the taps of Flint water users was contaminated with Legionella bacteria and dangerously high levels of toxic lead, both of which were poisoning those drinking the tap water. Such conduct on the part of the state actors, and especially the allegedly intentional poisoning of the water users of Flint, if true, may be fairly characterized as being so outrageous as to be "truly conscience shocking."

Defendants correctly observe that the California Court of Appeals has opined that an individual's right to bodily integrity is not implicated in the context of public drinking water and that the neither state nor federal substantive due process protections guarantee a right to a healthful or contaminant-free environment. *Coshow v City of Escondido*, 132 Cal App 4th 687, 709-710; 34 Cal Rptr 3d 19 (2005). Indeed, the California court also noted that "the right to bodily integrity is not coextensive with the right to be free from the introduction of an alleged contaminated substance in the public drinking water." *Id.* at 709. The court's rulings were informed, however, by the fact that the alleged contaminating substance at issue was fluoride, and by the court's acknowledgement that "courts throughout the United States have uniformly upheld the constitutionality of adding fluoride to the public water supply as a reasonable and proper exercise of the police power in the interest of public health" and that "[n]o court has recognized a substantive due process claim entitling citizens to drinking water in a form more pure than that required by federal and state drinking water standards." *Id.* *Coshow* did not address whether substantive due process protections are implicated where state actors allegedly abuse state police powers by knowingly and intentionally delivering drinking water contaminated with Legionella bacteria and dangerous levels of lead to a discrete population and thereby create a public health emergency. Moreover, none of the cases relied on by the court in *Coshow* address circumstances even remotely similar to those present in this case. Thus, the Court finds that *Coshow* provides no persuasive rationale to support defendants' request for summary disposition.

For the foregoing reasons, the Court concludes that plaintiffs have alleged sufficient facts, when taken as true, to establish a violation of each plaintiff's respective individual right to

bodily integrity under the substantive due process component of art 1, § 17. Summary disposition on that basis, pursuant to MCR 2.116(C)(8), is therefore inappropriate.

2. Availability of a Damage Remedy

Because plaintiffs have pleaded facts that could establish a claim for a violation of their respective individual rights to bodily integrity, the question becomes whether this case is an appropriate one, assuming plaintiffs' allegations to be proven, in which to impose a damage remedy on the state for a violation of art 1, § 17. To answer this question, the Court looks to the factual allegations set forth in plaintiffs' first amended complaint and the documentary evidence supplied by the parties, and takes guidance from Justice Boyle's separate opinion in *Smith*, as have the appellate courts of this state. See e.g., *Jones*, 462 Mich at 336-337; *Reid*, 239 Mich App at 628-629. Justice Boyle observed that the "first step in recognizing a damage remedy for injury consequent to a violation of our Michigan Constitution is, obviously, to establish the constitutional violation itself. *Smith*, 428 Mich at 648 (Opinion by BOYLE, J.). As previously noted, plaintiffs have alleged facts, if proven, that are sufficient to establish a violation of the protection constitutionally afforded to an individual's bodily integrity. Consequently, this factor weighs in favor of recognizing the availability of a damage remedy for the injuries alleged.

Justice Boyle identified the second step of the analysis as requiring a review of "the text, history, and previous interpretations of the specific provision for guidance on the propriety of a judicially inferred damage remedy." *Smith*, 428 Mich at 650 (Opinion by BOYLE, J.). There are several Michigan appellate decisions that acknowledge that the substantive component of the federal due process clause protects an individual's right to bodily integrity. See e.g., *Sierb*, 456 Mich at 527, 529; *Fortune v City of Detroit Public Schools*, unpublished opinion per curiam of

the Court of Appeals, issued October 12, 2004 (Docket No. 248306), unpub op at 2. There are no Michigan appellate decisions expressly recognizing the same protection under art 1, § 17, even though the due process clauses of the state and federal constitutions are considered coextensive, *Cummins v Robinson Twp*, 283 Mich App 667, 700-701; 770 NW2d 421 (2009). There are also no Michigan appellate decisions, published or unpublished, that recognize a stand-alone constitutional tort predicated on a violation of the right to bodily integrity. These circumstances weigh against recognizing the availability of a damage remedy for the injuries alleged.

Finally, Justice Boyle instructed that

> various other factors, dependent upon the specific facts and circumstances of a given case may militate against a judicially inferred damage remedy for violation of a specific constitutional provision. For example, the federal courts have refused a damage remedy in the face of Congress' exercise of its special authority over the military, see *Chappell v Wallace*, [462 US 296, 304; 103 S Ct 2362; 76 L Ed 2d 586 (1983)], and its special role in personnel management vis-à-vis federal employees, *Bush v Lucas*, [462 US 367; 103 S Ct 2404; 76 L Ed 2d 648 (1983)]. Other concerns, such as the degree of specificity of the constitutional protection, should also be considered. For example, there was no question in *Bivens* [*v Six Unknown Federal Narcotics Agents*, 403 US 388; 91 S Ct 1999; 29 L Ed 2d 619 (1971)], that the defendants had violated the warrant requirements of the Fourth Amendment. These search and seizure protections are, however, relatively clear-cut in comparison to the Due Process and Equal Protection Clauses. See Monaghan, The Supreme Court, 1974 term forward: *Constitutional common law*, 89 Harv L R 1, 44-45 (1975) (substantive guarantees of due process and equal protection are troubling in their character). The clarity of the constitutional protection and violation in a given case should be a factor in determining the propriety of a judicially imposed damage remedy. Another factor important in federal cases has been the availability of another remedy. In *Bivens*, *supra*, the lack of any alternative remedy was certainly a matter of concern to the United States Supreme Court. On the other hand, the presence of an alternative remedy in *Chappell v Wallace*, *supra*, was a factor weighing against a damage remedy for constitutional violations. [*Smith*, 428 Mich at 651-652 (Opinion by BOYLE, J.).]

Defendants assert that plaintiffs have other remedies available to vindicate a violation of their respective rights to bodily integrity, should plaintiffs be able to prove such a violation. To

determine whether there is an alternative remedy available to an award of monetary damages under a constitutional tort theory, the Court begins its analysis with the following backdrop of legal principles. First, as noted, the Michigan Supreme Court in *Smith* held that "[a] claim for damages against the state arising from violation by the state of the Michigan Constitution may be recognized in appropriate cases." *Smith*, 428 Mich at 544. This was reaffirmed by the Supreme Court in *Jones*, 462 Mich at 337 ("*Smith* only recognized a narrow remedy against the state on the basis of the unavailability of any other remedy."). The *Jones* Court's use of the term "only" derived from the fact that it was addressing (as was the Court principally addressing in *Smith*) claims against a municipality and individual municipal employees (rather than a state or individual state officials who generally enjoy greater immunities).

Defendants in this case nonetheless seize on certain language from *Jones* (referencing the availability of alternative remedies both against "a municipality" and "against an individual defendant" to suggest that *Jones* necessarily precludes a constitutional tort claim against *any* individuals, including individual state officials. Defendants thus argue that, as a matter of law, plaintiffs cannot assert a constitutional tort against the Governor or Earley and Ambrose. This Court disagrees, and finds that a proper reading of the pertinent caselaw compels the conclusion that the remedy allowed in *Smith*, while narrow, extends beyond the state itself to also reach state officials acting in their official capacity. The Supreme Court in *Jones*, for example, evaluated the availability of alternative remedies against municipalities and their employees as "[u]nlike states *and state officials sued in an official capacity*." *Jones*, 462 Mich at 337 (emphasis added). In doing so, it affirmed the opinion of the Court of Appeals (authored by now Chief Justice Young), which even more expressly stated, "we conclude that the *Smith* rationale simply does not apply outside the context of a claim that *the state* (*or a state official sued in an official*

capacity) has violated individual rights protected under the Michigan Constitution." *Jones*, 227 Mich App at 675 (emphasis within parenthetical added).

Plaintiffs have sued the Governor, Earley and Ambrose not in their respective capacities as individual government employees, but in their official capacities only. As observed in *Will v Michigan Dep't of State Police*, 491 US 58, 71; 109 S Ct 2304; 105 L Ed 2d 45 (1989), "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself." (Internal citations omitted.); see also, *McDowell v Warden of Michigan Reformatory at Ionia*, 169 Mich 332, 336; 135 NW 265 (1912); *Carlton*, 215 Mich App at 500-501. The named state officials are merely "nominal party defendant[s]." *McDowell*, 169 Mich at 336. Thus, plaintiffs' suit "is not a suit against the official personally," and plaintiffs can pursue a state constitutional tort claim against the Governor, Early and Ambrose in this case because, in the eyes of the law, state officers acting in their official capacities are indistinguishable from the state. *Jones*, 462 Mich at 337; *Estate of Braman*, unpub op at 6 n 7. However, plaintiffs must look to the state to recover on a judgment for monetary damages should one enter in their favor; the Governor and the former emergency managers may not be held personally liable for any such damages. *Carlton, supra.*

This Court thus concludes that the caselaw does not preclude a damage remedy arising out of plaintiffs' constitutional tort claims against the individual named defendants in this action—Governor Snyder and former emergency managers Earley and Ambrose—who are sued only in their official capacity. The Court reiterates, however, that because those individuals are sued only in their official capacity, they in essence are nominal defendants only, such that the

state and the state alone (and not the individuals themselves) are accountable for any damage award that may result in this action.

Having determined that a damage remedy against state officials sued in their official capacity is not precluded, the Court will examine whether, in fact, there are alternative remedies available. Defendants suggest that plaintiffs have alternative remedies available in part because plaintiffs have not alleged that a constitutional tort claim is their only available remedy. Defendants have provided no authority, however, nor has the Court located any, for the proposition that a failure to *allege* the lack of an alternative available remedy is a pleading deficiency that is fatal to a plaintiff's constitutional tort claim.[10]

Defendants further argue that plaintiffs in fact are pursuing certain "virtually identical" claims (albeit under the federal constitution, rather than the Michigan Constitution) against individual state officials in federal court, and that they also are pursuing certain similar claims against individual state officials in the Genesee Circuit Court. Based on the complaints filed in

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[10] The Court notes that MCL 600.6440 expressly provides that, although a claim in this Court may not proceed if there is "an adequate remedy upon [the] claim in the federal courts," "*it is not necessary in the complaint filed to allege that claimant has no such adequate remedy*, but that fact may be put in issue by the answer or motion filed by the state or the department, commission, board, institution, arm or agency thereof." (Emphasis added).

Further, the Court recognizes that our Michigan Supreme Court has held, in the context of state-law tort claims, that a "plaintiff must plead [his] case in avoidance of immunity." *Mack v City of Detroit*, 467 Mich 186, 203; 649 NW2d 47 (2002). Further, "[a] plaintiff pleads in avoidance of governmental immunity by stating a claim that fits within a statutory exception or by pleading facts that demonstrate that the alleged tort occurred during the exercise or discharge of a nongovernmental or proprietary function." *Id.* at 204. However, this requirement is inapplicable here, because plaintiffs have in this case alleged claims arising under the Michigan Constitution. As the Court held in *Smith*, "[w]here it is alleged that the state, by virtue of custom or policy, has violated a right conferred by the Michigan Constitution, governmental immunity is not available in a state court action." *Smith*, 428 Mich at 544. Therefore, plaintiffs in this case need not plead in avoidance of immunity.

those cases, as appended to the parties' briefs in this case, defendants' position in that regard appears to be correct. The Court notes, however, that plaintiffs name the Governor and the state as defendants in the federal suit for the purposes of prospective injunctive relief only.[11] See *Bay*

[11] The Court recognizes that a panel of the Court of Appeals in *77th District Judge v State of Michigan*, 175 Mich App 681, 696; 438 NW2d 333 (1989), overruled on other grounds by *Parkwood Limited Dividend Housing Ass'n v State Housing Development Authority*, 468 Mich 763; 664 NW2d 185 (2003), stated, in rejecting a damage remedy under an equal protection challenge, that the plaintiff "has as an alternative the remedy of prospective injunctive relief." However, this Court does not find that statement to be controlling or dispositive here, for several reasons. First, the Court in *77th District Judge* acknowledged that "equal protection is a broad and amorphous concept, not readily lending itself to the relative degree of certainty associated with theories underlying recognized constitutional torts." *Id.* Second, the opinion in that case was issued shortly after the fractured opinions were released in *Smith*, and before subsequent decisions by Michigan appellate courts that endorsed the reasoning of Justice BOYLE's separate minority opinion (whereas the Court in *77th District Judge* principally relied on the separate minority opinion of Justice BRICKLEY, which this Court in any event principally reads as favoring a finding "that there is no implicit right to sue the state for damages on the basis of violations of Const. 1908, art. 2, §§ 1 and 16 of the Michigan Constitution," *Smith*, 428 Mich at 639 (Opinion by BRICKLEY, J.)). Third, the Court in *77th District Judge* expressly limited its holding to "the specific facts, circumstances, and theories advanced in [that] case." *Id.*, 175 Mich App at 696. Fourth, because *77th District Judge* was overruled on the basis of its jurisdictional ruling, the balance of its analysis was dicta. *Harvey v State of Michigan*, 469 Mich 1, 14 n 14; 664 NW2d 767 (2003). Finally, because *77th District Judge* is not precedentially binding under MCR 7.215(J)(1), prudence dictates that this Court await more definitive and precedential authority from our appellate courts before disallowing a damage remedy for a constitutional tort simply because a plaintiff may be seeking, or may be able to seek, prospective injunctive relief in another court.

That being said, the Court does note that plaintiffs' related federal court action, while purportedly seeking against the Governor "exclusively . . . prospective equitable relief to correct the harm caused and prolonged by state government and to prevent future injury," and while similarly indicating that it seeks "prospective relief only" against the State of Michigan, it describes the equitable relief sought as an order "to remediate the harm caused by defendants [sic] unconstitutional conduct including repairs or [sic] property, [and] establishment of as [sic] medical monitoring fund . . . ." Plaintiffs also generally seek an award of compensatory and punitive damages. Developments in that and other Flint Water Crisis litigation, including the extent to which any "equitable" relief awarded may essentially equate to an award of monetary damages, may impact this Court's future conclusions both with regard to the availability of alternative remedies and other matters, including the remedies, if any, that may be appropriate in this action.

Mills, 244 Mich App at 749 (Under certain circumstances, suits against state officers for injunctive relief under § 1983 are allowed.). Moreover, plaintiffs name none of the defendants in this suit as party defendants in the Genesee Circuit Court action. Yet, defendants have not provided the Court with any authority, nor has the Court located any, for the proposition that an available remedy against a *different* party constitutes an available "alternative remedy" within the meaning of *Smith* and *Jones*. To the contrary, this Court concludes that it must look to a particular named defendant and discern whether a plaintiff would have recourse to enforce his or her rights against *that* defendant by means other than an award of monetary damages under a constitutional tort theory. See *Jones*, 462 Mich App at 335-337 (contrasting claims against the state and state officials, on the one hand, with claims against municipalities and individual municipal employees, on the other hand); *Estate of Braman*, unpub op at 6 n 7 (same).

The Court next observes that, regardless of what claims plaintiffs have actually asserted in other courts, the dispositive question is whether plaintiffs have alternative remedies *available* to them. See, e.g., *Jones*, 462 Mich at 337 ("*Smith* only recognized a narrow remedy against the state on the basis of the *unavailability* of any other remedy.") (emphasis added). Again, the Court begins its analysis of that question with certain general principles. A suit for monetary damages brought under 42 USC 1983, for a violation of rights guaranteed by the federal constitution or a federal statute, cannot be maintained in either a federal court or a state court against a state or a state agency or a state official sued in his or her official capacity, all of which have traditionally enjoyed Eleventh Amendment immunity. *Howlett v Rose*, 496 US 356, 365; 110 S Ct 2430; 110 L Ed 2d 332 (1990); *Bay Mills Indian Community v State of Michigan*, 244 Mich App 739, 749; 626 NW2d 169 (2001); *Hardges v Dep't of Social Services*, 201 Mich App 24, 27; 506 NW2d 532 (1993). Further, "the elective or highest appointive executive official of

all levels of government" is absolutely immune from "tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her . . . executive authority." MCL 691.1407(5). "[T]here can be no dispute" that this includes the Governor. *Duncan v State of Michigan*, 284 Mich App 246, 271-272; 774 NW2d 89 (2009), aff'd on other grounds 486 Mich 906 (2010). The defendant state departments similarly are "immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function," absent the application of a statutory exception, MCL 691.1407(1); *Duncan*, 284 Mich App at 266-267, while, generally, governmental employees acting within the scope of their authority are immune from tort liability except in cases in which their actions constitute gross negligence, MCL 691.1407(2). Moreover, even if the lower-level state employees are eventually found liable under a gross negligence theory, there would be no vicarious liability as to the state. *Malcolm v East Detroit*, 437 Mich 132; 468 NW2d 479 (1991). Also, there is no intentional tort exception to governmental immunity for intentional torts committed by governmental employees during the exercise or discharge of a governmental function, *Genesee Co Drain Comm'r v Genesee Co*, 309 Mich App 317, 328; 869 NW2d 635 (2015), and a governmental employer cannot be held vicariously liable for the intentional torts of its employees, *Payton v City of Detroit*, 211 Mich App 375, 393; 536 NW2d 233 (1995); *Lowery v Dep't of Corrections*, 146 Mich App 342, 357; 380 NW2d 99 (1985); *Trosien v Bay Co*, unpublished opinion per curiam of the Court of Appeals, issued December 22, 2005 (Docket Nos. 257363; 257364; 257413), unpub op at 4.

An as yet unanswered question arising from this recitation of general principles is whether former emergency managers Earley and Ambrose fall within the category of "the elective or highest appointive executive official of all levels of government" who, like the

Governor, are absolutely immune from "tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her . . . executive authority," MCL 691.1407(5), or whether, alternatively, they count among the lower-level state employees who lack governmental immunity for acts found to constitute gross negligence, MCL 691.1407(2)(c), or for intentional torts committed by them *other than* during the exercise or discharge of a governmental function, *Genesee Co Drain Comm'r*, 309 Mich App at 328 The Court concludes that they fall within the former category and, therefore, like the Governor, are absolutely immune from "tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her . . . executive authority," MCL 691.1407(5).

Defendant Earley was appointed as the emergency manager for the City of Flint in September 2013. (First Amended Complaint, p 11, ¶ 56.) Defendant Ambrose was appointed as the emergency manager for the City of Flint in January 2015. (First Amended Complaint, p 14, ¶ 70.) Both Earley and Ambrose were appointed pursuant to the local financial stability and choice act, MCL 141.1541 et seq., which became effective on March 28, 2013. See 2012 PA 436. That statute provides in part:

> An emergency manager is immune from liability as provided in section 7(5) of 1964 PA 70, MCL 691.1407. [MCL 141.1560(1).]

The Legislature has thus expressly granted emergency managers the same level of immunity as is granted to the Governor as "the elective or highest appointive executive official of all levels of government," and the emergency managers, like the Governor, are therefore absolutely immune from "tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her . . . executive authority," MCL 691.1407(5). Indeed, this

level of immunity for emergency managers flows from other aspects of the statutory scheme that established the emergency manager position. For example, MCL 141.1549 states in part:

> Upon appointment, an emergency manager shall act for and in the place and stead of the governing body and the office of chief administrative officer of the local government. The emergency manager shall have broad powers in receivership to rectify the financial emergency and to assure the fiscal accountability of the local government and the local government's capacity to provide or cause to be provided necessary governmental services essential to the public health, safety, and welfare. Following appointment of an emergency manager and during the pendency of receivership, the governing body and the chief administrative officer of the local government shall not exercise any of the powers of those offices except as may be specifically authorized in writing by the emergency manager or as otherwise provided by this act and are subject to any conditions required by the emergency manager. [MCL 141.1549(2).]

Emergency managers also are obliged to "issue to the appropriate local elected and appointed officials and employees, agents, and contractors of the local government the orders the emergency manager considers necessary to accomplish the purposes of this act, including, but not limited to, orders for the timely and satisfactory implementation of a financial and operating plan . . . ." MCL 141.1550(1). Further, orders issued by an emergency manager are "binding on the local elected and appointed officials and employees, agents, and contractors of the local government to whom it is issued." *Id.* Emergency managers are also empowered to take certain actions if the failure to carry out such an order "is disrupting the emergency manager's ability to manage the local government." MCL 141.1550(2).

As the Court of Appeals has recently observed,

> The Legislature has conferred upon emergency managers broad authority to act for and in place of the governing body of the local government:
>
> * * * [Quoting the above language from MCL 141.1549(2).]

Among other things, emergency managers are specifically empowered to

> "[r]emove, replace, appoint, or confirm the appointments to any office, board, commission, authority, or other entity which is within or is a component unit of the local government," MCL 141.1552(1)(ff), and "[t]ake any other action or exercise any power or authority of any officer, employee, department, board, commission, or other similar entity of the local government, whether elected or appointed, relating to the operation of the local government," MCL 141.1552(1)(ee). "The power of the emergency manager shall be superior to and supersede the power of any of the foregoing officers or entities." MCL 141.1552(1)(ee).

Martin v Murray, 309 Mich App 37, 48; 867 NW2d 444 (2015).

Thus, while in their capacity as emergency managers of the City of Flint, defendants Earley and Ambrose were state officials (see discussion, *supra*), the Court further concludes that they were "the elective or highest appointive executive official of [a] level[] of government," in this case the City of Flint. Therefore, they, like the Governor, are absolutely immune from "tort liability for injuries to persons or damages to property if [they were] acting within the scope of [their] . . . executive authority," MCL 691.1407(5). See also, *Petripren v Jaskowski*, 494 Mich 190; 833 NW2d 247 (2013) (holding that a village chief of police was the highest appointive executive official of a level of government and acted within the scope of his executive authority even when performing the duties of an ordinary police officer). See also, *Martin*, 309 Mich App at 52 (holding that an emergency manager of a school district had the exclusive authority to fill vacancies on the board of education by appointment, and that the power of the remaining members of the district's board of education was suspended during the financial emergency).

This raises the question of whether the Governor, Earley, or Ambrose were in fact acting within the scope of their executive authority, in relation to the allegations of this case, so as to entitle them to the absolute immunity granted by MCL 691.1407(5). That they were so acting appears in this case to be undisputed, inasmuch as plaintiffs have sued these defendants only in

their official capacity. Similarly, these plaintiffs appear not to have alleged otherwise either in their federal court lawsuit or their Genesee Circuit Court litigation. This indicates that plaintiffs acknowledge that these defendants were acting within the scope of their executive authority such that plaintiffs have no alternative remedy available to them relative to these defendants (and even though, as noted earlier in this opinion, these defendants are nominal defendants only, who are not individually subject to any damage award, and whose appearance in the suit is simply another way of suing the state).

That said, the Court certainly is aware that a multitude of lawsuits have been filed in various state and federal courts relative to the Flint Water Crisis variously naming as defendants numerous state, city, and non-governmental defendants. This Court is not currently in a position to know the full scope and nature of the claims and defenses in that universe of litigation. The Court does take judicial notice, anecdotally, that other plaintiffs in other action(s) have alleged certain claims, including against the Governor, Earley, or Ambrose, that purport to name those defendants in their individual capacity, and that assert claims including gross negligence. The Court must therefore consider whether the seeming potential availability of such claims mandates a conclusion that plaintiffs in this case have alternative remedies available to them with respect to the Governor, Earley, and Ambrose, such that their claims against those defendants should be dismissed.

The Court rejects such a conclusion. First, and without presuming to opine upon the merits of claims or defenses in other litigation, the Court concludes for the reasons noted that the Governor, Earley, and Ambrose are (or were), and are sued as, state officials who are not personally accountable with respect to the claims for damages asserted in this action. Second, while the Court is cognizant that the Court of Appeals in *Estate of Braman* commented that

"[a]lthough plaintiff claims that her available remedies before the circuit courts are not viable, this is irrelevant because the law is concerned with the availability, not the outcome, of plaintiffs' cause of action," *Estate of Braman*, unpub op at 4, n 5, citing *Jones*, 462 Mich at 337, it did so in the context not of state officials, but of lower-level state employees who then were not subject to jurisdiction in the Court of Claims and who enjoyed lesser levels of governmental immunity. Therefore, this Court does not read this observation of the Court in *Estate of Braman* to suggest that this Court must require plaintiffs to pursue alternative remedies against these defendants, in an individual capacity, that their own pleadings recognize would likely be subject to failure by virtue of governmental or sovereign immunity.

Thus, the Court holds that because the state, its agencies, and the Governor and former emergency managers acting in an official capacity, are not "persons" under 42 USC 1983 and enjoy sovereign immunity under the Eleventh Amendment and statutory immunity under MCL 691.1407 from common law claims, plaintiffs have no alternative recourse to enforce their respective rights against them. *Jones*, 462 Mich at 335-337; *Estate of Braman*, unpub op at 6 n 7. However, the Court again reiterates that because the Governor, Earley and Ambrose are sued only in their official capacity in this case, they are nominal defendants only, the state alone remains accountable for any resulting damage liability, and the Governor, Earley and Ambrose suffer no personal exposure to any potential monetary damage liability in this case. The issue whether there is an alternative remedy available against them may therefore be entirely academic in any event. But for these reasons, the Court concludes at this juncture that there is no alternative remedy available against any of the named defendants. With the caveat noted, the

lack of an available alternative remedy weighs in favor of recognizing the availability of a damage remedy for the constitutional tort alleged.[12]

Finally, significant favorable weight must be given to the degree of outrageousness of the state actors' conduct as alleged by plaintiffs, e.g., that various state actors allegedly intentionally concealed data and made false statements in an attempt to downplay the health dangers posed by using Flint's tap water, despite possessing scientific data and actual knowledge that the water supply reaching the taps of Flint water users was contaminated with Legionella bacteria and dangerously high levels of toxic lead, and the well-settled legal precept that substantive due process protections apply to an individual's right to bodily integrity.

Based on the totality of the circumstances set forth above, the Court finds that plaintiffs have alleged sufficient facts, if proven to be true, to establish a violation of the Michigan Constitution. The Court also finds that it would be appropriate at this juncture to recognize the availability of a damage remedy for the injuries alleged.[13] Summary disposition with regard to

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[12] The Court notes that although the Supreme Court in *Jones* characterized *Smith* as recognizing a narrow remedy "on the basis of the unavailability of any other remedy," *Jones*, 462 Mich at 337, Justice Boyle in *Smith* described the existence of a legislative scheme providing an alternate remedy as a " 'special factor[] counselling hesitation,' . . . which militate[s] against a judicially inferred damage remedy." *Smith*, 428 Mich at 647 (Opinion by BOYLE, J.), quoting *Bivens*, 403 US at 396. Thus, absent further guidance from our appellate courts, it remains unclear whether the availability of an alternative remedy, if presumed or found to exist, would constitute an absolute bar to inferring a damage remedy for a constitutional tort, or simply a factor to be considered.

[13] The Court's decision in this regard is further informed by the requirement of MCL 600.6458 that "[i]n rendering any judgment against the state, or any department, commission, board, institution, arm, or agency, the court shall determine and specify in that judgment the department, commission, board, institution, arm, or agency from whose appropriation that judgment shall be paid."

Count II is therefore inappropriate under MCR 2.116(C)(7) and (8).[14]

D. Count III - Fair and Just Treatment

The state defendants assert that Count III of plaintiffs' first amended complaint must be summarily dismissed pursuant to MCR 2.116(C)(7) and (8) because plaintiffs have failed to satisfy the threshold criteria for the recognition of a viable cause of action under the fair and just treatment clause of Const 1963, art 1, § 17, which provides: "The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed." Again, it is unnecessary for this Court to reach the issue of whether such a cause of action is or should be recognized, because even if a cause of action exists for a violation of this clause, plaintiffs have not and cannot allege facts to state a claim under the theory for the reasons set forth below. Count III of plaintiffs' first amended complaint must be dismissed pursuant to MCR 2.116(C)(8).

An individual, firm, corporation, or voluntary association's right to fair and just treatment exists only in the context of legislative and executive hearings and investigations, *By Lo Oil Co v*

[14] Further supporting the denial of summary disposition to the Governor, Earley and Ambrose at this time is the Court's cognizance that plaintiffs seek injunctive relief against these state officials in their official capacities. MCR 2.201(C)(5) requires "[a]n officer of the state" to "be sued in the officer's official capacity" when a plaintiff seeks "to enforce the performance of an official duty." See also, *Gaertner v State of Michigan*, 385 Mich 49, 55; 187 NW 429 (1971) (noting that GCR 1963, 201.3(5), the predecessor rule to MCR 2.201(C)(5), did not require certain state officials to be named as party defendants where the injunction did not require an affirmative act in performance of an official duty and where the presence of the state officials was not necessary to effect complete relief.). At this juncture of this litigation, this Court is unable to determine whether injunctive relief will be proven to be appropriate, and whether the presence of these state officials as named (if nominal) defendants in this case will be necessary to effect complete relief.

Dep't of Treasury, 267 Mich App 19, 40; 703 NW2d 822 (2005); *Johnson v Wayne Co*, 213 Mich App 143, 155; 540 NW2d 66 (1995), and not before a hearing or investigation commences or after a hearing or investigation ceases, *Groves v Dep't of Corrections*, 295 Mich App 1, 12; 811 NW2d 563 (2011). For an investigation to implicate the fair and just treatment clause, the investigation must consist of a "searching inquiry for ascertaining facts" or a "detailed or careful examination of the events surrounding [a] plaintiff's misconduct." *Groves*, 295 Mich App at 12, quoting *Messenger v Dep't of Consumer & Industry Services*, 238 Mich App 524, 534; 606 NW2d 38 (1999); see also *Carmacks Collision, Inc v City of Detroit*, 262 Mich App 207, 210-211; 684 NW2d 910 (2004). Moreover, the fair and just treatment clause requires some "active conduct" engaged in by the state actor during the investigation. *By Lo Oil Co*, 267 Mich App at 41. "[T]he fair and just treatment clause does not mandate adequate investigations." *Traverse Village, LLC, v Northern Lakes Community Mental Health*, unpublished opinion per curiam of the Court of Appeals, issued December 30, 2014 (Docket Nos. 317194; 317211), unpub op at 7. "Further, the historical context in which this clause was adopted suggests that it was intended to protect against the excesses and abuses of Cold War legislative or executive investigations or hearings." *By Lo Oil Co*, 267 Mich App at 40. As observed in *Jo-Dan Ltd v Detroit Bd of Ed*, unpublished opinion per curiam of the Court of Appeals, issued July 14, 2000 (Docket No. 201406):

> we cannot forget that the Constitution of 1963 is a product of those unique times in which certain legislative investigations and hearings, notably those aimed at identifying "subversives," negatively affected citizens even in the absence of proof that they actually committed any illegal conduct. Indeed, Michigan at one time had laws intended to protect government from "subversive" individuals and passed legislation creating a "security investigation division" as well as a "subversive activities investigation division" of the State Police in order to gather information on citizens and then have them register with the government. [Unpub op at 10.]

Like Michigan's Constitution, Alaska's constitution contains a fair and just treatment clause. The clause was included in the Alaska constitution "to protect against abuses of the type experienced during the McCarthy era," *Folsom v Alaska*, 734 P2d 1015, 1018 (Alaska, 1987), including "vilification, character assassination, and an intimation of guilt by association," *Keller v French*, 205 P3d 299, 303-304 (Alaska, 2009). The protections offered by the clause are implicated when a plaintiff is exposed to any such abuses. *Id.* at 304.

Although a plaintiff's recovery for a violation of the fair and just treatment clause is predicated on being personally exposed to the abuse of legislative or executive power, *Groves*, 295 Mich App at 12; *Keller*, 205 P3d at 304, plaintiffs fail to allege any such personal exposure. They do not allege that they were witnesses or potential witnesses in an investigation or investigative targets. They do not allege any facts suggesting that defendants engaged in active conduct that subjected any plaintiff to "vilification, character assassination, . . . an intimation of guilt by association" or other similar abusive behaviors. *Keller*, 205 P3d at 303-304. Rather, their allegations suggest a breach of a duty owed to every individual, firm, corporation and voluntary association of this state. Such allegations are insufficient to state a claim for a violation of art 1, § 17. Moreover, to the extent that plaintiffs assert that their complaints were ignored and went uninvestigated, such facts pertain to acts occurring before any investigation commenced and such acts do not fall within the ambit of the term "investigation" for purposes of art 1, § 17. *Groves*, 295 Mich App at 12. Likewise, plaintiffs' claims of inadequately conducted investigations do not fall within the ambit of art 1, § 17. *Traverse Village, LLC*, *supra*, unpub op at 7. Plaintiffs fail to allege circumstances under which they could prevail and, thus, is it unnecessary for the Court to reach the issue of whether such a cause of action is or should be

recognized in Michigan. Summary disposition is therefore appropriate, in favor of all defendants, on Count III of plaintiffs' first amended complaint, pursuant to MCR 2.116(C)(8).

V. COUNT IV - INVERSE CONDEMNATION

Finally, defendants maintain that plaintiffs have failed to state a claim for inverse condemnation and, therefore, that Count IV of plaintiffs' first amended complaint must be summarily dismissed pursuant to MCR 2.116(C)(8). The Court disagrees.

Eminent domain or condemnation is the power of a government to take private property for public use. *Silver Creek Drain District v Extrusions Division, Inc*, 468 Mich 367, 373-374; 663 NW2d 436 (2003). "US Const, Am V and Const 1963, art 10, § 2 prohibit the taking of private property for public use without just compensation." *Adams Outdoor Advertising v City of East Lansing (After Remand)*, 463 Mich 17, 23; 614 NW2d 634 (2000). In furtherance of its exercise of the constitutional power of eminent domain, the state may follow the procedures codified in the Uniform Condemnation Procedures Act, MCL 213.51 *et seq*., "and condemn, or 'take,' private property for public use by providing the requisite compensation." *Dorman v Twp of Clinton*, 269 Mich App 638, 645; 714 NW2d 350 (2006). A property owner may commence an inverse or reverse condemnation action seeking just compensation for a de facto taking when the state fails to bring a condemnation proceeding under the Act. *Blue Harvest, Inc v Dep't of Transportation*, 288 Mich App 267, 277; 792 NW2d 798 (2010). Additionally, an inverse condemnation action is appropriately commenced where private property has been damaged rather than formally taken for public use by government actions. *In the matter of Acquisition of Land – Virginia Park*, 121 Mich App 153, 158; 328 NW2d 602 (1982). Not every diminution in property values remotely associated with governmental actions will amount to a "taking."

Attorney General v Ankersen, 148 Mich App 524, 561; 385 NW2d 658 (1986). As observed in *Blue Harvest*,

> "[w]hile there is no exact formula to establish a de facto taking, there must be some action by the government specifically directed toward the plaintiff's property that has the effect of limiting the use of the property." [*Dorman*, 269 Mich at 645] (citation and quotation marks omitted). Generally, a plaintiff's alleging a de facto taking or inverse condemnation must establish (1) that the government's actions were a substantial cause of the decline of the property's value and (2) that the government abused its powers in affirmative actions directly aimed at the property. *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 548; 688 NW2d 550 (2004). "Further, a plaintiff alleging inverse condemnation must prove a casual [sic] connection between the government's action and the alleged damages." *Id.* Additionally,
>
> > [a]ny injury to the property of an individual which deprives the owner of the ordinary use of it is equivalent to a taking, and entities him to compensation. So a partial destruction or diminution of value of property by an act of government, which directly and not merely incidentally affects it, is to that extent an appropriation. [*Peterman v Dep't of Natural Resources*, 446 Mich 177, 190; 521 NW2d 499 (1994) (citations and quotation marks omitted).] [*Blue Harvest*, 288 Mich App at 277-278.]

"[T]he courts examine both the intensity and form of the accompanying publicity and the deliberateness of specific actions directed at a particular plaintiff's property by the city to reduce its value." *Heinrich v City of Detroit*, 90 Mich App 692, 698; 282 NW2d 448 (1979).

In the present litigation, plaintiffs allege that state actors made the decision to switch to the Flint River as the source of drinking water despite knowledge of the danger posed by the water, without a state-conducted scientific assessment of the suitability of the use of Flint River water as drinking water, and of the inadequacies of Flint's water treatment plant. They also allege that various state actors concealed data and made false statements in an attempt to downplay the health dangers posed by using Flint's tap water. Moreover, plaintiffs' allege that the contaminated water supply flowed from the river to the water plant and then to the taps of

every Flint water user. These allegations are allegations of affirmative state actions that were directly aimed at the property of Flint water users and that exposed those properties to specific dangers not generally experienced by water users outside of Flint. Plaintiffs allege specific damage to plumbing, water heaters and service lines causes by the introduction of corrosive water that left this infrastructure unsafe to use even after the corrosive water stopped flowing. They also allege a diminution of property values. Applying the settled principles governing the establishment of inverse condemnation, accepting all well-pleaded factual allegations as true and viewing those allegations in a light most favorable to plaintiffs, the nonmoving parties, the Court must conclude that plaintiffs have pleaded sufficient facts to state a cause of action for inverse condemnation. The allegations are sufficient, if proven, to allow a conclusion that the state actors' actions were a substantial cause of the decline of the property's value and that the state abused its powers through affirmative actions directly aimed at the property, i.e., continuing to supply each water user with corrosive and contaminated water with knowledge of the adverse consequences associated with being supplied with such water. *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 548; 688 NW2d 550 (2004). Therefore, summary disposition pursuant to MCR 2.116(C)(8) is inappropriate with regard to the state and its departments, as further factual development could possibly justify recovery. For the reasons previously expressed in the Court's discussion of Count II, the Court finds in unnecessary to further address whether the Governor, Earley and Ambrose, as state officers acting and sued in their official capacities, are proper parties against which to assert the inverse condemnation claim.

VI. CONCLUSION

For all of these reasons, the Court having fully considered the parties' respective arguments on the pending motions, and being otherwise fully apprised;

IT IS ORDERED that summary disposition in favor of all defendants is GRANTED on Counts I and III of plaintiffs' first amended complaint.

IT IS FURTHER ORDERED that summary disposition is DENIED, without prejudice, as to all defendants, on Counts II and IV of plaintiffs' first amended complaint.

This Order does not resolve the last pending claim and does not close the case.

Dated: October 26, 2016

Hon. Mark T. Boonstra
Court of Claims Judge

EXHIBIT 2

STATE OF MICHIGAN

COURT OF CLAIMS

HAZIM GULLA *et al*,

Plaintiffs,

OPINION ON STATE DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

v

Case No. 16-000298-MZ

RICHARD SNYDER *et al*,

Hon. Christopher M. Murray

Defendants.

I. INTRODUCTION

Plaintiffs have filed a four-count complaint against defendants alleging a violation of art 1, § 17 of the Michigan Constitution (Count I), a violation of art 10, § 2 of the Michigan Constitution (Count II),[1] a violation of the Michigan Natural Resources and Environmental Protection Act (Count III), while Count IV requests relief for diagnostic, medical and psychological/counseling services, intervention and treatment. Presently before the Court is the State defendants'[2] motion for summary disposition under MCR 2.116(C)(4), (7), and (8). Defendants' motion was filed on May 5, 2017, and plaintiffs' response was filed on June 8, 2017. The State defendants filed a reply brief on June 30, 2017. The motion is therefore ripe for decision.

[1] Count II is being brought only by "plaintiff property owners and/or users for whom the action of the State damaged property, plumbing, water heaters, and water service lines by introducing corrosive Flint River water into property water systems." Amended complaint, ¶ 290.

[2] The "State defendants" are the State of Michigan, Governor Rick Snyder, the Michigan Department of Environmental Quality, and the Michigan Department of Health and Human Services.

Rather than recount the facts leading up to the instant lawsuit, the Court will simply address in its analysis of the arguments whatever relevant facts that were made available to the Court with this motion. The Court points out, however, that in deciding this motion under MCR 2.116(C)(8), it must accept as true the allegations set forth in plaintiffs' amended complaint, while it must accept those same allegations as true under (C)(7) unless contradicted by evidence submitted by the parties. See *Stephens v Worden Ins Agency, LLC*, 307 Mich App 220, 227; 859 NW2d 723 (2014) and *Lawrence v Burdi*, 314 Mich App 203, 211; 886 NW2d 748 (2016).[3] The only "evidence" relied upon by the parties in this motion is the July 2011 document entitled "Analysis of the Flint River as a permanent water supply for the city of Flint," a Flint Water Advisory Task Force Integrated Timeline created March 21, 2016, and the notice of claims filed by some of the plaintiffs. The Court now turns to the issues raised by defendants in their motion.

II. ANALYSIS

A. NOTICE REQUIREMENTS

Defendants move this Court for summary disposition, contending that plaintiffs failed to comply with the notice requirements of the Court of Claims Act. It is well established that the state may place certain conditions or restrictions on claimants who seek to impose liability against the state. *McCahan v Brennan*, 492 Mich 730, 736; 822 NW2d 747 (2012). "One such condition on the right to sue the state is the notice provision of the Court of Claims Act, MCL 600.6431 . . .." *Id.* Section 6431 has been described by our Supreme Court as "establish[ing] those conditions precedent to pursuing a claim against the state." *Fairley v Dep't of Corrections*, 497 Mich 290, 292; 871 NW2d 129 (2015). See also *Rusha v Dep't of Corrections*, 307 Mich

[3] MCR 2.116(C)(4) is not being utilized in resolving this motion.

App 300, 307; 859 NW2d 735 (2014) (§ 6431 "is an unambiguous condition precedent to sue the state[.]" (citation and quotation marks omitted). In pertinent part, the statute provides that:

> No claim may be maintained against the state unless the claimant, within 1 year after such claim *has accrued*, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against the state or any of its departments, commissions, boards, institutions, arms or agencies, stating the time when and the place where such claim arose and in detail the nature of the same and of the items of damage alleged or claimed to have been sustained, which claim or notice shall be signed and verified by the claimant before an officer authorized to administer oaths. [MCL 600.6431(1) (emphasis added).]

Our Supreme Court has declared that "no judicially created saving construction is permitted" to avoid this "clear statutory mandate." *McCahan*, 492 Mich at 733.

In the instant case, plaintiffs are seeking damages for personal injuries by way of their constitutional tort claims, and for property damage, by way of their inverse condemnation claims. With regard to claims for personal injury or property damage, § 6431(3) shortens the time period for giving notice to six months. The statute provides: "In all actions for property damage or personal injuries, claimant shall file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within 6 months following *the happening of the event giving rise to the cause of action*."

B. THE HAPPENING OF THE EVENT GIVING RISE TO THE CAUSE OF ACTION

It is apparent that notice must be given, regardless of the theory asserted. See MCL 600.6431(3) (applying the notice provision to "all actions for property damage or personal injuries"); *Rusha*, 307 Mich App at 307-308 (applying § 6431 to claims alleging constitutional violations). It is also apparent that notice must be given within six months. What is less clear, at first glance, is what triggers the six-month period? Unlike subsection (1), which uses the word "accrued," subsection (3) uses the phrase "the happening of the event giving rise to the cause of

action." Our Supreme Court has explained that, in spite of the existence of some differences in the language employed in subsection (1) and subsection (3), the subsections are "related and interdependent" and the subsections are to be construed in light of one another. *McCahan*, 492 Mich at 741. Thus, the language in the lengthier subsection, subsection (1), should be understood as applying to the shorter subsection, subsection (3). *Id.* As the *McCahan* Court remarked, "the Legislature need not be overly repetitive in reasserting the requirements for notice in each subsection when the only substantive change effectuated in subsection (3) is a reduction in the timing requirement for specifically designated cases." *Id.*

Accordingly, in order for notice to be timely under § 6431(3), it must be provided within six months of when a plaintiff's claims accrue. However, that brings up yet another question: what did the Legislature intend when it used the term "accrued" in § 6431? In determining when a claim "accrued" under § 6431, the Court of Appeals has explained that the term "accrue" should be interpreted to allow suit by a plaintiff within six months of when the plaintiff has reason to know of the existence of a claim or can bring such a claim, and not necessarily within six-months from the date of the purported harm. See *Cooke Contracting Co v State*, 55 Mich App 336, 338; 222 NW2d 231 (1974) (for purposes of § 6431, "a claim accrues only when suit may be maintained thereon."); *Oak Constr Co v State*, 33 Mich App 561, 563-564; 190 NW2d 296 (1971). The Court in *Cooke* and *Oak* expressed concerns over claim manipulation, particularly with a state defendant being able to delay or obfuscate the accrual date, thereby defeating a plaintiff's claim before the plaintiff could even bring the claim. See *Cooke*, 55 Mich App at 339; *Oak*, 33 Mich App at 565-566.

The Court notes that this understanding of "accrue" is at odds with caselaw interpreting the Revised Judicature Act's (RJA) definition of "accrue," as that term is used in MCL 600.5827

of the RJA. Section 5827 provides a general rule for claim accrual, specifying that "the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." However, the Court is not convinced that § 6431 incorporated § 5827's definition of "accrual."[4] As an initial matter, § 5827, by its plain language, is an accrual statute that applies to "periods of limitations . . ." The notice provisions in § 6431, although serving similar goals to periods of limitations, are *not* periods of limitations. *Rusha*, 307 Mich App at 311-312. Moreover, a different section of the Court of Claims Act, § 6452, expressly incorporates "the provisions of the RJA chapter 58, relative to the limitation of actions" for purposes of construing "the limitation prescribed in this section," MCL 600.6452(2), meaning the limitations period expressed in the Court of Claims Act. Again, the notice provisions in § 6431 are not periods of limitations. That the Legislature incorporated the RJA's provisions with regard to periods of limitations to the limitations period applicable to Court of Claims actions, but not to the Court of Claims' notice provisions, is significant. "When the Legislature includes language in one part of a statute that it omits in another, this Court presumes that the omission was intentional." *Dep't of Environmental Quality v Gomez*, 318 Mich App 1, 43; 896 NW2d 39 (2016). With that principle in mind, the Court presumes that the Legislature acted intentionally when it specified that the RJA's provisions were to apply to periods of

[4] Although the Court of Appeals reached a different conclusion in *Bauserman v Unemployment Ins Agency*, unpublished opinion per curiam of the Court of Appeals, issued July 18, 2017 (Docket No. 333181), this Court is not bound by the decision in this case. See MCR 7.215(C)(1) ("An unpublished decision is not precedentially binding under the rule of stare decisis.").

limitations under the Court of Claims Act, but not to the Court of Claims Act's notice provisions in § 6431.[5]

Accordingly, consistent with the reasoning of *Cooke* and *Oak*, the Court concludes that plaintiffs' claims in the instant case did not begin to accrue until plaintiffs knew or had reason to know that they had a cause of action or causes of action against the state for the harm allegedly incurred by ingesting contaminated water. The Court notes, however, that Plaintiffs did not need to know the full extent of the conduct that allegedly harmed them in order for their claims to accrue. For instance, the full extent of the conduct alleged in their due process claim with regard to shocking the conscience did not need to be known in order for that claim to accrue. Courts examining similar tort theories have rejected this idea, explaining that, to hold otherwise would mean that accrual would only occur " 'after a plaintiff became satisfied that he had been harmed enough . . .' " *RN v Redal*, __ F Supp 3d __, __ (WD Wash, 2017), quoting *Wallace v Kato*, 549 US 384, 391; 127 S Ct 1091; 166 L Ed 2d 973 (2007). In other words, the full extent of the tortious conduct need not be known before a claim accrues. Rather, only the existence of the harm had to be known.

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[5] Because the Court concludes that § 5827 does not apply to an understanding of the term "accrued" as that term is used in § 6431, plaintiffs' citation to the RJA's tolling provisions relative to fraudulent concealment, see MCL 600.5855, is inapposite. In fact, the Court of Appeals, albeit in nonbinding, unpublished decisions, has twice declined to apply § 5855's tolling effect to the notice provisions of § 6431. *Brewer v Central Michigan Univ Bd of Trustees*, unpublished opinion per curiam of the Court of Appeals, issued November 21, 2013 (Docket No. 312374), unpub op at 2-3; *Zelek v State of Michigan*, unpublished opinion per curiam of the Court of Appeals, issued October 16, 2012 (Docket No. 305191), unpub op at 2. In addition, the conclusion that § 6431's focus on "accrual" is not controlled by § 5827 renders irrelevant, or certainly, less relevant, caselaw applying the concept of accrual under § 5827. This includes caselaw which has clarified that a common-law discovery rule does not apply to § 5827. See, e.g., *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378, 407; 738 NW2d 664 (2007).

C. EXAMINING PLAINTIFFS' CLAIMS

With the above understanding, and applying the standard governing motions filed pursuant to MCR 2.116(C)(7), the Court examines the allegations in plaintiffs' complaint, paying significant attention to the pertinent dates asserted in the amended complaint. Turning to those allegations, the Court examines the theories behind plaintiffs' constitutional tort and inverse condemnation claims.[6] Specifically, the constitutional tort claim, which is premised on the substantive component of the Due Process Clause, see *In re Forfeiture of 2000 GMC Denali*, 316 Mich App 562, 573; 892 NW2d 388 (2016), alleges that defendants violated their respective rights to bodily integrity. In order to prevail on this theory, plaintiffs need to plead and prove that the execution of an official State policy or custom was the moving force behind the deprivation of the right to bodily integrity. See *Carlton v Dep't of Corrections*, 215 Mich App 490, 505; 546 NW2d 671 (1996). Thus, the focus is on when plaintiffs were deprived of their bodily integrity, i.e., when they were injured. With regard to the inverse condemnation claim, plaintiffs must plead and prove that the State took "some action" that was "specifically directed toward the plaintiff's property that has the effect of limiting the use of the property." *Dorman v Clinton Twp*, 269 Mich App 638, 645; 714 NW2d 350 (2006).

Here, there is no dispute that the earliest notice of claim filed by any of the plaintiffs was on April 4, 2016.[7] Consequently, unless the "happening of the event giving rise to the causes of

[6] Plaintiffs' claim articulated in Count III of their complaint essentially raises the same factual allegations as their constitutional claims, and is untimely for the reasons articulated herein. Count IV of plaintiffs' complaint does not plead a cause of action but instead merely articulates various forms of relief. That is an independent basis for dismissal. MCR 2.111(B)(1). Moreover, Count IV, which is premised on the same factual allegations as the other claims, is untimely as well.

[7] Plaintiffs Chapman (multiple plaintiffs), Jones, Marshall, Patrick, Rogers, and Atkins-Nelson.

action" occurred after October 4, 2015, plaintiffs notices were filed too late.[8] According to plaintiffs' amended complaint, by October 2, 2015, the following had occurred:

1) On April 25, 2014, the public water source provided to Flint residents was switched to Flint River water, and "within days of the introduction of Flint River water into the Flint pipelines, the noxious sight, taste, and smell of water flowing from the taps was apparent." [Amended Complaint, ¶ 5.] Plaintiffs further allege that this sight, taste and smell of the water created "irrefutable evidence" that the water coming into their homes was "not fit for human consumption and dangerous for human use and exposure." [*Id.*]

2) "During the months following April 25, 2014, evidence mounted that the Flint River water was not only unfit for human consumption, and use, but was toxic and unsafe, causing lead poisoning of Flint's children and other serious medical conditions to Plaintiffs." [Amended Complaint, ¶ 6.]

3) In approximately June 2014, "[m]any Flint water users reported that the water was making them ill" and that there were numerous "citizen complaints" about the water, yet the state failed to act. [Amended Complaint, ¶ 184.]

4) A few months later, on or about October 13, 2014, General Motors announced that in a "highly publicized report" that, because of the corrosive nature of Flint's water, it would no longer use Flint River water in its Flint plan. According to plaintiffs, General Motors'

[8] The filing of a complaint also satisfies the statutory notice requirement, see MCL 600.6431(1), but the complaint was filed December 8, 2016, eighth months after the earliest notice of intent was filed.

decision as "clear evidence of serious and significant danger . . ." [Amended Complaint, ¶ 187.]

5) The links between Flint River water and health risks began to grow, and the public continued to receive information—it did not receive information from the state, however, and this failure of the state is a primary focus of plaintiffs' allegations—about potential health hazards in January 2015.

6) Specifically, "[o]n January 27, 2015, Flint was placed on notice that the Genesee County Health Department ("GCHD") believed there was an association between the spike in Legionella disease reports and the onset of the use of Flint [R]iver water." [Amended Complaint, ¶ 209.]

7) Also in "January 2015," "Flint water users belated received a notice stating that the water was not in compliance with the Federal Safe Drinking Water Act due to unlawful levels of THMs." [Amended Complaint, ¶ 219.]

8) On or about February 17, 2015, "Flint water users staged public demonstrations demanding that Flint re-connect with" Detroit Water and Sewerage Department (DWSD). [Amended Complaint, ¶ 234.]

9) On or about March 25, 2015, the Flint City Council voted to reconnect to the DWSD, but former emergency manager Gerald Ambrose rejected the proposal, thereby "exacerbate[ing] the State-created danger . . ." [Amended Complaint, ¶ 241.]

10) Concerns continued to mount, including in "the summer of 2015" when Dr. Mona Hanna-Attisha published a study observing a spike in Flint children with elevated levels

of lead in their blood, as measured during the second and third quarters of 2014. [Amended Complaint, ¶ 257.]

11) On or about September 25, 2015, plaintiffs allege that "[t]he public health crisis was first confirmed by the Genesee County Health Department and the City of Flint on September 25, 2015, when they issued a lead advisory warning city residents about high levels of lead in Flint water." [Amended Complaint, ¶ 270.]

12) State defendants who, according to the allegations in plaintiffs' complaint, either dismissed or tried to discredit allegations of contamination before this time, began acknowledging the lead contamination problem in early October 2015. For instance, according to plaintiffs' complaint, on or about October 2, 2015, "State officials announced that the State would appoint a Flint Water Advisory Task Force and would provide water filters designed to eliminate the lead in the water to Flint water users." [Amended Complaint, ¶ 264.]

13) On or about October 8, 2015, Governor Snyder ordered Flint to reconnect to the DWSD. [Amended Complaint, ¶ 265.]

14) On or about October 16, 2015, Flint's water source was reconnected to the DWSD. [Amended Complaint, ¶ 266.]

15) On or about December 14, 2015, Flint Mayor Karen Weaver declared a state of emergency, with the Governor following suit on or about January 5, 2016. [Amended Complaint, ¶¶ 268.]

1. PLAINTIFFS' DUE PROCESS CLAIMS

Reviewing plaintiffs' allegations regarding their purported due process violation, it is clear that they allege that their constitutional right to bodily integrity was violated by the state defendants conduct "in exposing Flint residents to toxic water ... ." That exposure, which plaintiffs' characterize as "the unwarranted and unconstitutional invasion of Plaintiff's bodily integrity," first occurred in April of 2014, when the allegedly contaminated water began flowing into plaintiffs' homes. According to the amended complaint, "by late 2014 or early 2015," Flint's water contained "extraordinarily high levels of lead, as well as dangerously high levels of Trihalomethanes ("THM"), coliform, E. Coli and other bacteria." Amended Complaint, ¶ 8. Thus, the constitutional right to bodily integrity was allegedly violated, at the very latest, "by late 2014 or early 2015." The violation of the right asserted, rather than the subsequent damages from that violation, is the focus when determining when the happening of the event occurred. See, e.g., *Frank v Linkner*, __ Mich __, __; 894 NW2d 574 (2017); slip op at 17. See, also, *Cummings v Connell*, 402 F3d 936, 942-943 (CA 9, 2005) (recognizing a distinction between the violation of a constitutional right and the damage a person may or may not suffer from that violation). But when did they-or should they-have known that the right was violated such that the notice period under the act commenced? The Court now turns to that question.

Again, focusing on plaintiffs' allegations, there was a plethora of information made available to the public that Flint's water was unfit for human consumption. And, for purposes of applying § 6431(3)'s six-month notice period, that information was, according to the allegations in the amended complaint, made available more than six months before the initial notices of intent were filed, making even the earliest notices untimely. According to the allegations contained in plaintiffs' amended complaint, there was publicly available information about the

contamination in Flint's water and the harmful effects associated with use and consumption of the water. This included complaints about water quality in 2014, and a report in June 2014 about how consuming the contaminated water made users ill. And, in October 2014, General Motors announced publicly that it would no longer use Flint's water, due to contamination concerns. In January 2015, Flint users were, according to plaintiffs' amended complaint, put on notice that there was an association between Flint River water and Legionella disease, and that Flint's drinking water was not in compliance with federal standards for safe drinking water. These concerns led the city council to request that the acting Emergency Manager approve a switch back to the DWSD. Fears over water quality continued to mount, including after the publication of a report by Dr. Hanna-Attisha, who reported on elevated lead levels being found in Flint's children. According to the allegations in plaintiffs' amended complaint, Dr. Hanna-Attisha's report gained traction in the Flint community, to the point where a Michigan Department of Environmental Quality official—who allegedly tried to discredit and disparage the report—remarked that the report sparked "near-hysteria" in late September of 2015. Amended Complaint, ¶ 262. And finally, on or about September 25, 2015, Genesee County and the City of Flint issued a lead-advisory warning to city residents.

In light of these allegations, the Court concludes that plaintiffs should have been aware of a possible cause of action for a violation of their due process rights by, at the very latest, September 25, 2015. Not only had the constitutional right been allegedly violated by that time, but there had been months of outcry such that plaintiffs were armed with sufficient information to file a notice of intent under § 6431. Indeed, as recounted above, more than six months prior to the earliest-filed Notices of Intent, plaintiffs admit that: (1) the water system was switched to a new system; (2) within a few months of April 2014 it was obvious to the eye and taste that the

water was unfit for human use; and (3) reports, advisories, and ultimately government warnings were issued about the dangers of the water and that bottled water would be supplied by the state. This was enough to give plaintiffs "ordinary knowledge" of the claim, for purposes of filing a notice of intent. See *Rusha*, 307 Mich App at 311-312.[9] Thus, even with the allegations of a "cover up" regarding the water quality by certain defendants, plaintiffs' own allegations establish that the public[10] was aware by the end of September 2015 that the water was not fit for human use. In fact, the only other relevant events pled by plaintiffs were the October 2, 2015 decision to provide water filters, the October 8 decision by Governor Snyder to switch the water source back to Detroit, and the actual switch that occurred on October 16, 2015. But these events establish nothing new relative to the "happening of the event" that gave rise to these causes of action. Obviously, switching back to the Detroit water system did not violate plaintiff's right to bodily integrity, as that is the water source that was used prior to the switch at issue. And, as far as the Governor making a decision on October 8, plaintiffs' are not challenging the decision to switch back to the Detroit water system and the allegations indicate that the state publicly declared the water unsafe no later than October 2, when it created the Task Force and stated that bottled water would be made available to Flint residents.

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[9] Providing statutory notice is generally a less taxing undertaking than the task involved in filing a complaint. *Rusha*, 307 Mich App at 312. Armed with the knowledge outlined above, plaintiffs, exercising ordinary diligence, had enough information to file a notice of intent more than six months before they did so in this case. Because of this law, plaintiffs' allegation that they were unaware of what was occurring in Flint during this time period, does not alter this conclusion.

[10] Only a few of the allegations specify discrete events regarding particular plaintiffs. For example, according to the amended complaint, plaintiff Hazim Gulla "has suffered from physical injury" "since the summer of 2015." Plaintiff Barbara Davis had on several occasions "beginning in August 2015" moved from her house because of the water supply.

In reaching this conclusion, the Court is not unmindful—and not untroubled—by plaintiffs' allegations about efforts by various defendants or state employees to obfuscate or, at times spread outright falsehoods, about the purported public health crisis. Nevertheless, the Court cannot escape the above conclusion that Flint residents, including plaintiffs, had (according to plaintiffs' own allegations) other sources of information available to them about the existence of a possible claim due to contaminated water. Thus, despite the fact that the state allegedly engaged in obfuscation, the facts, as alleged, do not show that plaintiffs could not have been aware of a potential cause of action against the state. In this respect, the instant case is distinguishable from cases like *Cooke* and *Oak*, where the Court of Appeals expressed concerns that the defendants may be able to successfully manipulate the plaintiffs' claims to the point where the plaintiffs would have been unable to bring them. Here, in spite of the state's alleged concealment and misinformation, there were other sources of public and private information, some of which existed for close to a year before even the first plaintiffs filed notices of intent, which should have alerted plaintiffs to a potential cause of action. And even giving plaintiffs the benefit of the doubt and finding that their claims did not accrue, at the earliest, until the issuance of a public lead-advisory in September 2015, even the earliest filed notices in this case—filed with the Court on April 4, 2016—were still outside of the six-month time period.

Enforcing the notice provision under these facts would also not be "rewarding" these defendants for any alleged "cover-up." As already discussed, the allegations within the amended complaint establish that, despite what these defendants were allegedly saying, most other sources of public information (the city, county, hospitals and professors) were telling the public what plaintiffs allege they already knew in 2014-that the water was not safe for human use. If the only available source of information was the state, then plaintiffs' argument would have much more

force. Indeed, as noted in *Mays*, it would be difficult to allow the state to deny the existence of any problem, as is alleged in this case, and then to assert in litigation that the claim accrued at the very time the state was issuing its denials and asserting alleged misinformation. But again, the allegations in the amended complaint contradict the notion that plaintiffs were uninformed about the water issues prior to late September 2015 and/or October 2, 2015.

Plaintiffs' reliance upon this Court's decision in *Mays* is misplaced, for in that case the Court found a question of fact existed on whether the notice provision was satisfied because of the "unique circumstances" in that case, the allegations of alleged concealment of the contaminated tap water, and the fact that "the event giving rise to the cause of action was not readily apparent as the time of its happening." *Id.* at 10-11. As an initial matter, the Court notes that the complaint in *Mays* was filed on or about January 21, 2016, which was over 3 months before the notices were filed in this case. By contrast, in this case, virtually all of the allegations within plaintiffs' amended complaint relate to events occurring more than six months prior to the filing of the earliest notices of intent, and those allegations show that the public was repeatedly informed (including by two governments, the county and city) that the water was contaminated and not fit for human use. Hence, prior to September 25, 2015, and according to plaintiffs' own allegations, it was known by the public that the water was capable of causing damage to people and property, despite any alleged claims by certain defendants to the contrary.

A more relevant decision is *Brewer v Central Mich Univ Bd of Trustees*, unpublished opinion per curiam of the Court of Appeals, issued November 21, 2013 (Dkt. No. 312374). In

that unpublished decision,[11] the plaintiff worked at a Central Michigan University shooting range from June 1995 to April 1998, and then left due to experiencing medical issues such as peripheral neuropathy, headaches, seizures, and memory loss. *Brewer*, at *1. The plaintiff was diagnosed with lead poisoning in May of 2011, and filed his notice of injury in August of 2011. The defendant moved for summary disposition, arguing that the plaintiff failed to satisfy, amongst other things, the six-month notice provision within MCL 600.6431(3). *Id.* The trial court granted the defendant's motion.

The Court of Appeals affirmed on the basis that the plaintiff had failed to comply with the notice provision within MCL 600.6431(3). Although the trial court had ruled that the "plaintiff failed to satisfy MCL 600.6431(3) because he did not bring his claim until September of 2011, over 10 years after the injury occurred in . . . April 1998," *id.*, the plaintiff argued that both the fraudulent concealment statute and the fiduciary relationship he had with the defendant caused the six-month notice period to not trigger until he was informed by the doctor of his lead poisoning. *Id.* The Court of Appeals disagreed, holding:

> In this case, 'the happening of the event giving rise to the cause of action,' MCL 600.6431(3), was the alleged lead poisoning that occurred, at the latest, in 1998 at CMU. Plaintiff spent years knowingly exposing himself to lead particles while working at the range, as he had observed lead dust in the water and on the floor. He also was aware of his injuries from 1998 or before, as he claimed he was experiencing significant medical issues like peripheral neuropathy, seizures, memory loss, headaches, and other disabling physical ailments while working at CMU. However, plaintiff did not notify defendant of any possible connection to his position at the University, nor did he provide the requisite notice under MCL 600.6431(3) until years after the six-month period had expired.

[11] The Court is well aware that unpublished opinions of the Court of Appeals have no precedential effect, but they can be of persuasive value. MCR 7.215(C)(1). The Court considers *Brewer* to be a persuasive decision because of its similarity to the facts of this case.

Thus, in *Brewer* the six month period began to run in April 1998 because the plaintiff knew he was exposed to lead and was experiencing numerous ailments. Like the plaintiff in *Brewer*, plaintiffs in this case, according to their allegations, had their constitutional right to bodily integrity violated as early as April 2014, and no later than December 2015. By that time plaintiffs should have been aware that the public water source had been switched from the Detroit water system to Flint River water, that the water was by sight and taste not fit for human use, and that professors, doctors, private corporations, and governments alike had publicly stated that the water was not for human use. All of this occurred more than six months before the filing of the earliest notices, and shows that by that time they should have been aware of the "happening of the event" that gave rise to their causes of action. MCL 600.6431(3). Accordingly, based upon the plain language of the notice provision, and the strict requirements that must be followed, and the closely analogous decision in *Brewer*, the Court concludes that the six-month time period under the notice provision commenced no later than September 25, 2015.

2. PLAINTIFFS' INVERSE CONDEMNATION CLAIMS

As it concerns plaintiff property owners' claim for inverse condemnation, the amended complaint articulates two means by which the pertinent plaintiffs were harmed. The first concerns damage to plumbing, water heaters, and service lines, which was purportedly caused by contaminated water flowing through the piping, water heaters, and service lines. The second harm is an alleged loss of use and enjoyment of the property premised on the theory that, once the crisis became public, "property values plummeted" and plaintiffs "experienced substantial loss of the value" of their homes. See Amended Complaint, ¶¶ 270, 293.

Relative to the damage to piping, service lines, and water heaters, it is unclear from the allegations in the amended complaint when this type of injury occurred.[12] In this sense, the amended complaint alleges that this harm resulted from repeated exposure to contaminated water; hence, unlike the alleged violation of the right to bodily integrity, this type of injury did not necessarily occur with the first exposure to the contaminated water. At the very latest, this injury could have occurred on the last date when Flint River water was used as the source of the city's public water supply. However, it is not apparent from the allegations when plaintiffs were aware of this occurring. Notably, the public information disseminated about the harmful effects of the water was, according to the amended complaint, primarily focused on the detrimental health effects of the contaminated water, and not necessarily on the effects that the water had on piping, water heaters, or service lines. Although the amended complaint alleges a highly publicized report declaring that General Motors stopped using Flint River water because it corroded auto parts, this does not equate to knowledge that the same water could corrode and damage cast iron piping, water heaters, or service lines in plaintiff property owners' homes. Thus, on this record, the Court concludes that a genuine issue of fact exists as to: (1) when this injury occurred; and (2) when plaintiff property owners knew or should have known about the injury. Accordingly, for plaintiff property owners who have alleged damage to the piping, water heaters, and service lines in their homes, the Court declines to find that § 6431 bars their claims at this juncture.

[12] The Court rejects at this time defendants' argument that the notices filed were deficient for failing to state the time when the claims arose and the nature of the items damaged. See MCL 600.6431(1). Based on the same lack of certainty as to when the piping, water heaters, or services lines were damaged, the Court concludes, at this juncture, that the notices filed, which generally mentioned damage to the home, satisfied § 6431(1)'s requirements. Discovery may provide additional facts as to when the injury-damage to the pipes, heaters and lines-occurred so as to allow a renewed motion on this ground.

However, as it concerns inverse condemnation and plaintiffs' allegations of damage to the use and enjoyment of property, the Court concludes that such allegations are untimely. The State action taken directly towards plaintiffs' property was the allegedly contaminated water flowing into their homes. Plaintiffs' amended complaint asserts this occurred on April 25, 2014, well more than six months before the notices of intent were filed. The amended complaint also alleges that the injury, as it concerns the loss of use and enjoyment of the property, occurred when the public became aware of the contaminated water. In other words, according to plaintiffs, this particular injury occurred simultaneously with the public announcements about the contaminated water. And, as noted above, these announcements were sufficient to inform plaintiffs, at the latest, that they had been harmed by late September of 2015. The earliest-filed notices of intent were filed in April 2016, which was more than six months from accrual, making them untimely with respect to this particular theory.

In support of this conclusion, the Court notes the Court of Appeals' recent decision in *Henry v Dow Chemical*, __ Mich App __; __ NW2d __ (2017) (Docket No. 328716). The Court's decision in *Henry*, which involved somewhat analogous facts, is illustrative and a comparison to that case is helpful. The *Henry* case began in 2003, with allegations that Dow Chemical had been polluting the area in and around the Tittabawasee River floodplain for years. *Id.*, slip op at 1-2. In the "spring" of 2001, MDEQ tested soil samples near the river and discovered hazardous levels of the chemical dioxin, which is a substance that has been linked to several significant health problems. *Id.* at 2. The MDEQ indicated that Dow Chemical was the likely source of the dioxin contamination. *Id.* The previous iterations of the *Henry* litigation are not pertinent to this case, but the theory of liability, and allegations examined in the most recent opinion, bear some relevance to this case. That is, the most recently alleged theory posited that

Dow Chemical's activity of allegedly polluting the Tittabawasee River floodplain caused the plaintiffs to suffer loss of the use and enjoyment of their property, including, but not limited to, decreased property value. *Id.* at 1. In addition, the plaintiffs alleged, the recent public warnings, which included restrictions on even going outside near contaminated sites, "led to a significant loss of the use and enjoyment of plaintiffs' property and diminution in property value." *Id.* at 5. In other words, it was alleged that the public release of information by MDEQ about the contamination caused the damages alleged by the plaintiffs. *Id.*

Dow Chemical moved for summary disposition, arguing that the statute of limitations had expired. According to Dow, the plaintiffs' claims accrued in the early 1980s, when Dow Chemical was first believed to have been connected to dioxin contamination in the Tittabawasee River area. *Id.* at 6. Dow pointed to the fact that there had long been public knowledge of the dangerous of dioxin in the area, beginning in the early 1980s. *Id.*

In its decision, the Court of Appeals analyzed the claim within the framework of the general accrual statute set forth in the RJA, MCL 600.5827. Under § 5827, the period of limitations begins to run when the claim accrues, "which is 'the time the wrong upon which the claim is based was done regardless of the time when damage results.' " *Id.* at 4, quoting MCL 600.5827. The Court explained that accrual begins when all of the elements of a cause of action, including the element of damages, are present and can be alleged in a complaint. *Id.* at 5 (citations omitted). As for that case, the Court concluded that the harm alleged by the plaintiffs—loss of use and enjoyment of their property—occurred when the MDEQ first publicly announced the dioxin contamination and associated health threat. *Id.* The public announcement, reasoned the Court, "marked the creation of the damages element necessary for plaintiffs' nuisance and negligence claims." *Id.* Thus, it was not the plaintiffs' knowledge that was

determinative, but rather, when the MDEQ publicly announced the contamination. *Id.* Before that pronouncement, the plaintiffs were free to use and enjoy their property without restriction. *Id.* In other words, they were not damaged, for purposes of the claim they were asserting, until the MDEQ publicly announced the dioxin contamination and land-use restrictions. *Id.* at 6-7.

The Court also rejected Dow Chemical's argument that general public knowledge about possible dioxin contamination in the area, which began in the 1980s, was sufficient to spark the accrual of the plaintiffs' claims. *Id.* at 6. According to the Court, "public knowledge of river contamination" did not suffice. *Id.* The information available, prior to the MDEQ's pronouncement in 2001, did not "suggest that dangerous levels of dioxin had reached the flood plain soils." *Id.* In addition, the contamination that led to the MDEQ's public announcement "did not occur until many years after" the contamination that was generally known in the 1980s. *Id.*

In this case, plaintiffs similarly allege that, after the crisis became public, the value and marketability of their properties plummeted. See Amended Complaint, ¶ 270.[13] To the extent this would represent a compensable theory under an inverse condemnation claim, it is untimely. Indeed, assuming that public announcements were the cause of the harm, like in *Henry*, plaintiffs did not file their notices within six months of the announcements, for the reasons stated above. Accordingly, even applying the reasoning of *Henry*, plaintiffs' claim was nevertheless untimely.

D. RESPONSE TO PLAINTIFFS' ARGUMENTS

[13] Again, this is in addition to allegations of damage to the piping, service lines, and water heaters.

Plaintiffs' arguments consist largely of urging this Court to recognize and/or create an exception to the enforcement of the hard and fast notice provisions contained in § 6431. Plaintiffs place particular emphasis on *Rusha*, where the Court of Appeals stated that "the exception to enforcement lies where 'it can be demonstrated that [statutes of limitations] are so harsh and unreasonable in their consequences that they effectively divest plaintiffs of the right of the access to the courts intended by the grant of the substantive right.' " *Rusha*, 307 Mich App at 311, quoting *Curtin v Dep't of State Hwys*, 127 Mich App 160, 163; 339 NW2d 7 (1983). But the only holding of *Rusha* is that the plaintiff's constitutional tort claim was subject to the six-month notice provision within MCL 600.6431(3), and the plaintiff's failure to comply with the notice provision required dismissal of the case.[14] The sentence emphasized by plaintiffs came at the end of a paragraph recognizing the not-too controversial notion that imposing statutory deadlines on constitutional claims was not an uncommon occurrence, a point made in response to the plaintiff's argument that the constitution could not be trumped by a statutory notice period. In this Court's view, *Rusha* supports application of the notice provision in the instant case.[15]

Finally, plaintiffs also argue that because of the nature of the events at issue in this and other "Flint water" cases, the Court should create an exception to the six-month statutory notice provision. But the Court has no power to judicially amend a clear statutory provision, no matter

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[14] In this respect, the Court notes that the opinion in *Rusha* expressly acknowledged and applied the Supreme Court's holding in *McCahan* that MCL 600.6431 demands strict compliance, anything short of which mandates dismissal. See *Rusha*, 307 Mich App at 307, 313.

[15] Though it does not impact the holding of this Court, defendants appear correct in their argument that the statement from *Curtin* is no longer a valid statement of the law as it pertains to statutes of limitations, because it relied upon *Reich v State Highway Dep't*, 386 Mich 617; 194 NW2d 700 (1972). See *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 201; 731 NW2d 41 (2007).

how strong the equities are to do so. *Eastbrook Homes Inc v Dep't of Treasury*, 296 Mich App 336, 347; 820 NW2d 242 (2012). The Court cannot let the apparent injustice of its decision affect its duty to enforce the law passed by the Legislature. See *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 591; 702 NW2d 539 (2005) ("Indeed, if a court is free to cast aside, under the guise of equity, a plain statute such as § 3145(1) simply because the court views the statute as 'unfair,' then our system of government ceases to function as a representative democracy."). Application of a time sensitive law, such as a statute of limitations or a notice provision like the one at issue here, are by their very nature harsh rules. They result in harsh decisions. As the Supreme Court recognized in *Solowy v Oakwood Hosp*, 454 Mich 214, 225-226; 561 NW2d 843 (1997):

> We recognize that Mrs. Solowy's situation is sympathetic because she proceeded with some diligence in filing her claim. Although she did not sit on her rights for long, she unfortunately sat on them long enough to miss the statute of limitations cut off by approximately eight days. This type of case illustrates the apparent arbitrariness of statutes of limitations. This arbitrariness, however, is unavoidable and is the essential nature of any statute of limitations. While we are sympathetic to those who miss the deadline by a few days, their claims are nevertheless barred.

Accord: *Hall v Fortina*, 158 Mich App 663, 669; 405 NW2d 106 (1986). Applying the facts as alleged by plaintiffs to the controlling law that this Court is by oath required to follow, the Court concludes that plaintiffs' substantive due process claims are untimely under § 6431(3) and have to be dismissed as to these defendants.

III. REMAINING ARGUMENTS ON INVERSE CONDEMNATION

As it concerns plaintiff property owners who have alleged damage to piping, water heaters, and service lines, State defendants contend that the inverse condemnation claims must fail on the merits. The Court, having rejected similar arguments in the *Mays* decision, see *Mays*, pp 47-49, rejects those similar arguments made here as well. In so doing, the Court differentiates

this decision from its recent opinion granting summary disposition to defendant Dan Wyant, the former MDEQ director, for the reason that the allegations as to the State defendants assert more than mere misfeasance or inaction. Rather, as articulated in *Mays* and which need not be repeated in detail here, allegations that the State defendants knowingly made the switch to Flint River water, despite knowing the risks, without conducting adequate studies, and that some of the State actors concealed pertinent data and/or made false statements, suffice to show affirmative actions aimed directly at the affected property owners.

IV. CONCLUSION

For these reasons, the Court will enter a contemporaneously issued order granting the State defendants' motion for summary disposition as to Counts I, III, and IV, and these claims will be dismissed against the moving parties, and granting in part and denying in part as to Count II.

Dated: September 13, 2017

Christopher M. Murray
Judge, Court of Claims

STATE OF MICHIGAN
IN THE SUPREME COURT

GRANT BAUSERMAN, KARL WILLIAMS, And TEDDY BROE, individually and on behalf of a class of similarly-situated persons,

Plaintiffs-Appellees,

v.

STATE OF MICHIGAN UNEMPLOYMENT INSURANCE AGENCY,

Defendant.

_____/

Supreme Court Case No.156389

Court of Appeals No. 333181

Court of Claims
Case No. 2015-000202-MM
Hon. Cynthia Diane Stephens

PROOF OF SERVICE

On October 17, 2017, I e-mailed Plaintiffs-Appellants' reply brief in support of application for leave to appeal to:

Debbie K. Taylor
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3030 W. Grand Blvd. Suite 9-600
Detroit, MI 48202-6030
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And served it through the Michigan Supreme Court's electronic filing to all counsel of record.

I declare that the statements above are true to the best of my knowledge, information and belief.

/s/ Kathy Prochaska
LEGAL ASSISTANT
KPROCHASKA@PITTLAPW.COM

Date: October 17, 2017